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Study Series

Freedom of the Individual under Law: an Analysis of Article 29 of the Universal Declaration of Human Rights

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Freedom of the Individual under Law

A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights

by Erica-Irene A. Daes

Special Rapporteur of the
Sub-Commission on Prevention of Discrimination and
Protection of Minorities

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Preface

The basic object of this preface is to serve as a guide to introduce the reader to some of the complex humanitarian, sociological, legal, political, economic and social questions involved in the study of "the individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights" which the Sub-Commission on Prevention of Discrimination and Protection of Minorities asked the Special Rapporteur to prepare.

The study fulfils the terms of reference laid down by the Sub-Commission in its resolution 9 (XXVII) of 21 August 1974. Accordingly, an attempt has been made throughout the study to examine and interpret not only the provisions of articles 1, 29 and 30 of the Universal Declaration of Human Rights but also the fifth preambular paragraph of both International Covenants on Human Rights as well as articles 4, 5 and 8 of the International Covenant on Economic, Social and Cultural Rights and articles 4, 5, 6, 7, 8, 9, 12, 14, 18, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights.

The entry into force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights[1] marks a turning-point in the development of a world community under the rule of law. The International Covenants on Human Rights are the extension of the Universal Declaration of Human Rights and a consummation of it on the juridical plane. Together they constitute an international code of human rights, which has changed the role of the United Nations in the field of human rights through a transition from promotional activities in favour of universal respect for and observance of human rights and fundamental freedoms for all without distinction to action for their effective protection.

The Special Rapporteur wishes to underline the fact that the views expressed in the study are based mainly on the relevant rules of international law and in particular of the Charter of the United Nations, in which the peoples of the United Nations reaffirm their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and of nations large and small. They are further especially based on the Universal Declaration of Human Rights, the International Covenants on Human Rights and other international instruments on human rights, notably the Proclamation of Teheran, in paragraph 5 of which it is stated that the primary aim of the United Nations in the sphere of human rights is the achievement by each individual of the maximum freedom and dignity.

In addition, the Special Rapporteur believes that the provisions of article 29 of the Universal Declaration of Human Rights, like the provisions of all the other articles of the Declaration and the relevant articles of the International Covenants on Human Rights, should be used as a shield for the protection of the individual and as a means for the attainment by all human beings, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,[2] of that dignity to which man is born. This is the basic and general interpretation of the aforementioned provisions of the Universal Declaration of Human Rights and of the International Covenants on Human Rights which the Rapporteur applies throughout this study.

In our era the whole world forms, for some purposes at least, a single community. This is one of the motives which led the initiators of the Universal

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[1] The International Covenant on Economic, Social and Cultural Rights entered into force on 3 January 1976. The International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights entered into force on 23 March 1976.

[2] Article 2 of the Universal Declaration of Human Rights and of the International Covenants on Human Rights

Declaration of Human Rights to draft an international instrument on human rights, the provisions of which either constitute general principles of law or represent elementary human considerations applicable to the world community.

The foundations upon which the study rests are:

(*a*) The basic concept of freedom under law in a real democratic community;

(*b*) The fundamental principles of respect for human dignity, the rule of law, justice, equality and non-discrimination;

(*c*) The moral, political, legal and jurisprudential principles relating to the right of the individual to develop his personality freely and fully in a democratic community; and

(*d*) The concept of the moral, legal and general responsibility of the individual.

The meaning of the concept "freedom under law" in the present study is that, whenever there is any conflict between the personal freedom of the individual and any other rights or interests, then the freedom of the individual shall prevail. The concept "personal freedom" means the freedom of every law-abiding individual to think what he will, to express his views freely and to go where he will without let or hindrance from any other individuals.[3] This freedom should be justly balanced with the recognition of and respect for the rights and freedoms of others and the requirements of morality, public order and the general welfare in a democratic society.[4]

The law, which protects individuals one against the other, also defends the rights of the individual against the power of the State, and the State against the exercise of individualism.

A judicial system which provides for independent judges[5] reveals, perhaps better than any other institution, the perfect equilibrium between the liberty of the individual and the power of the State.

The fundamental aspect which prevails throughout this study finds its origin in the famous democratic principle of the great ancient Greek sophist Protagoras: "Man is the measure of all things". Accordingly, the present study should be considered as a contribution to the freedom of the individual under the law.

ERICA-IRENE A. DAES

Athens, June 1980

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[3] Epictetus, *Moral Discourses*, Everyman's Library (London, Dent, 1957), book IV, chap. I, p. 200. See also Sir Alfred Denning, *Freedom under the Law* (London, Stevens, 1949), p. 5.

[4] Universal Declaration of Human Rights, art. 29, para. 2.

[5] See *Seminar on National and Local Institutions for the Promotion and Protection of Human Rights*, Geneva, 18–29 September 1978 (ST/HR/SER.A/2 and Add. 1), paras. 42–52, 99 (i) (30), (32), (33) and (37) and 185 (11).

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ABBREVIATIONS

EEC	European Economic Community
ILO	International Labour Organisation
OAS	Organization of American States
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East.
WHO	World Health Organization

EXPLANATORY NOTES

Resolutions of the Commission on Human Rights referred to in the present study are to be found in the relevant annual reports of the Commission to the Economic and Social Council, in the series *Official Records of the Economic and Social Council*.

Introduction

THE INDIVIDUAL AND THE CONTEMPORARY WORLD COMMUNITY

A. The evolution of the protection of the individual from the end of the Middle Ages to the time of the League of Nations minorities system

1. Humanists and international lawyers have long been concerned with the protection of the fundamental rights of the individual.

2. In particular, the subject of the position of the individual in international law has been discussed ever since the days of the classical writers, although the result has often been to deny him any position, despite the fact that it was accepted that the individual is the basic unit to which any legal system is directed.

3. In classical international law, the individual was regarded as an object; that is to say, he enjoyed no rights and was burdened by no duties.

4. Among other possible approaches, it seems appropriate for the present study to consider medieval Europe, which had some of the characteristics of a contemporary community, as an historic point of departure for examining the relationship between the individual and society.[1] The urge for individual freedom and self-expression found scientific, religious and philosophical outlets in the movements of the Reformation and the Renaissance.

5. International law started in medieval Europe in the form of rules governing relations between individuals—but individuals in an exalted and exclusive category. In late medieval terminology, individuals had to be *sui juris*, that is to say, free from the overlordship of any other mortal. With the transformation of absolutist rulers into organs of State, heads of State were increasingly regarded as representatives of their State rather than as principals in international transactions.

6. It was implicit in the exclusive character of the relations between persons *sui juris* that those *alieni juris* had no rights under international law.

7. Thus, in medieval Europe, as a bearer of rights and duties, the ordinary individual as such was left outside the domain of international law. Like chattel, the ordinary individual was a mere object of international law. The sovereign to whom any individual owed allegiance had the right—but was under no duty—to look after the interests of his subjects abroad. If he chose to do so, he would make his claim in his own right.

8. During the eighteenth and nineteenth centuries especially, with the expansion of the commercial activities of the inhabitants of certain European States, these States found it necessary to make specific provision in their treaties for the protection of particular groups of nationals. This is the case for the United Kingdom when it entered into several treaties with Morocco[2] whereby the latter agreed, *inter alia*, to treat all its nationals alike, whether they were Christian or not.

9. In certain cases Christian States claim the international right of humanitarian intervention when Christians were persecuted.[3]

10. Even though occasional actions or diplomatic *démarches* were resorted to in the past on behalf of individuals not nationals of the protesting State, the general tendency was for a State to arrange, by way of bilateral treaties or the use of safe conducts, for its own nationals to receive what might be termed civilized treatment when abroad. The convenience of this practice eventually led to the evolution of what is generally described as treatment in accordance with the minimum standard of international law for the treatment of aliens. This means that an alien is entitled to receive from the country in which he is residing, or which he happens to be visiting, the bare modicum of civilized rights. It could be noted that those rights are tantamount to what the civilized world regards as the minimum conditions of the rule of law. Among those rights are: the right to a trial, the right to receive a fair hearing, the right of an accused person to be heard in his own defence, etc. Any infringement of the minimum standard of international law in respect of the treatment of aliens[4] remains uncorrected unless the State of which the injured alien is a national decides to take the matter up with the offending State.

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[1] In connection with the evolution of international society and medieval international law, see G. Schwarzenberger, *The Frontiers of International Law* (London, Stevens, 1962), pp. 44–51.

[2] See, for example, the Treaty of Commerce and Navigation between Great Britain and Morocco, signed at Fez on 14 June 1801, and the General Treaty and Convention of Commerce between Great Britain and Morocco, signed at Tangier on 9 December 1856, in C. Parry, ed., *The Consolidated Treaty Series* (Dobbs Ferry, New York, Oceana Publications, 1969), vol. 56 (1801–1803), pp. 93–103, and vol. 116 (1856–1857), pp. 121–141.

[3] History records a great number of humanitarian interventions by the great Powers on behalf of persecuted Christian subjects of the Ottoman Empire.

[4] On the protection of aliens, see in particular Baroness Elles, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *International Provisions Protecting the Human Rights of Non-Citizens* (United Nations publication, Sales No. E.80.XIV.2).

11. If the alien happened to be stateless, there was, in the absence of any treaty giving the parties to the treaty the right to protest against the ill-treatment of stateless persons, no State to which the injured individual could turn for protection.[5]

12. Since the beginning of the nineteenth century in particular, a few general treaties have also been concluded to abolish gross violations of human rights, such as the slave trade.[6]

13. Sympathy for religious minorities[7] and humanitarianism contributed to the further expansion of the international protection of the individual, by way of treaty and, on occasions, direct intervention.

14. Further, the nationality principle received recognition in the international protection of minorities.[8] It is important here to refer briefly to the Minorities Treaties, for they have, to a certain extent, formed the basis for the present attitude towards human rights. During the First World War, the Allied and Associated Powers found in the principle of national self-determination a potent weapon in their war against the Central Powers. The Allied Powers, in their reply to the German Peace Proposals of 1916, affirmed, *inter alia*, that "no peace is possible as long as the reparation of violated rights and liabilities, the acknowledgment of the principle of nationalities and of free existence of small states shall not be assured".[9]

15. The territorial settlements following the First World War resulted in a number of national groups finding themselves minorities in an alien environment. In certain cases, these minorities belonged ethnically to the former territorial sovereign, and to protect them against unjustified discrimination the new sovereign was required to enter into treaty commitments.

16. The basic object of the Minorities Treaties was to assure the minorities full enjoyment, in law and in fact, of the elementary rights secured to the individual in every civilized state—the right to protection of life, liberty and the dignity of the human person and equality of treatment with the majority of the population.

17. In addition, in accordance with the relevant sections of the Peace Treaties of 1919 and with unilateral declarations, prior to their admission to membership of the League of Nations, certain States were required to accept far-reaching limitations of sovereignty in favour of their minorities.

18. In the 1920s, the minorities system established by the League of Nations in practice worked fairly well.

19. Thus, problems concerning the treatment of these national minorities, especially the German minority in Poland, frequently came for consideration before the Permanent Court of International Justice. In the case concerning the German settlers in Poland, the Court defined what it meant by "equality", emphasizing that this term was used in the Minorities Treaties to indicate "real" and not merely "formal" equality. This may mean that if a minority is to receive true equality, it may well have to be afforded preferential treatment as compared with the majority among which it is living.

20. Such a situation arose in connection with the Greek minority schools in Albania. There was no treaty by which Albania was obliged to afford protective treatment to the Greek minority within its borders. However, when Albania was admitted to the League of Nations it undertook to afford to this minority treatment in accordance with the minorities régime. When, at a later date, the Albanian Government decided to amend the Constitution so as to forbid private schools, the Greek Government persuaded the League of Nations to apply to the Permanent Court of International Justice for an advisory opinion as to whether the decision to close Greek schools under this legislation was compatible with Albanian undertakings. Despite the absence of a treaty, the Court reached the conclusion that enough common standards were to be found in the existing Minorities Treaties for it to be possible to speak of a definite minorities régime. In the view of the Court, equality of treatment between the minority and the majority was a basic condition of this régime. Since the Greek community could only preserve its national characteristics if its children were educated in their own language, culture, religion and traditions, undue discrimination would be exercised against the community if it were not allowed to preserve its own schools. The majority, on the other hand, would not suffer in the same way by being required to attend State schools.

21. In this connection, it should be made clear that the aforementioned advisory opinion is relevant only where the State whose conduct is impugned is under a clear obligation, either by way of treaty or by unilateral undertaking, to treat a minority in a special way. Even then, the rights of the individuals are protected only to the extent that the third States to which their sovereign has given an undertaking to protect them are prepared to take the initiative for their protection on their behalf. If no third State is so prepared, then, regardless of any paper undertakings that the sovereign may have assumed, such a minority is completely at the mercy of its ruler.

22. When after 1931, the League of Nations gradually disintegrated, its system for the protection of minorities also broke down.

23. None the less, it is significant that in the post-1919 period and until 1939, international law had become the universal law governing relations between sovereign States. In this period the principle of the

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[5] Nowadays some measure of protection is given to stateless persons by the Convention relating to the Status of Stateless Persons, 1954, which entered into force on 6 June 1960 (see below, paras. 101–105).

[6] See *Report on Slavery* (United Nations publication, Sales No. 67.XIV.2).

[7] For example, in the Treaty of Augsburg of 1555 it was agreed that in the Free Cities in the Holy Roman Empire, the two confessions were to coexist "quietly and peacefully". In the Peace Treaty of Westphalia of 1648 the "Reichsabschied" of 1555 was confirmed and thus became part of the Public Law of Europe.

[8] A beginning was made in the Final Act of the Congress of Vienna (1815). In the Balkans, as in eastern Europe, nationality tended to coincide with religion. Thus, the duties imposed by the Congress of Berlin of 1878 on Bulgaria, Montenegro, Romania and Serbia in favour of racial and religious minorities equally served to protect national minorities.

[9] See J. Robinson and others, *Were the Minorities Treaties a Failure?* (New York, Antin Press, 1943), p. 4.

equality of States was complementary to the principle of State sovereignty.[10]

B. The Constitution of the International Labour Organisation (ILO) and the protection of the individual

24. The Treaty of Versailles had created, *inter alia*, one important humanitarian institution which has proved enduring. Part XIII of that instrument contained the Constitution of the International Labour Organisation (ILO). The preamble declared that the purpose of the League of Nations was to secure universal peace, which could not be attained without "social justice". Thus, the ILO was presented as a means to the end of peace and as a machinery to assist in achieving the great purpose of the League. However, the High Contracting Parties implied that social justice might be an end in itself when they announced that, in setting up the ILO, they were moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world.

25. The Constitution of the ILO is almost entirely devoted to setting forth the structure and procedures of an agency for the world-wide regulation of labour-employer relations and the conditions under which wage-earners work. It contains some other provisions, however, relating to the regulation of the labour supply, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of the interest of workers who are employed in countries other than their own, etc.

26. The principles and purposes of the ILO were restated in the Declaration concerning the Aims and Purposes of the International Labour Organisation, 1944, adopted by the General Conference of the ILO at Philadelphia. This Declaration was embodied in the Constitution of the ILO as an annex by an amendment of 1946.[11] The Conference of Philadelphia reaffirmed the fundamental principles on which the Organisation was based and, in particular, that (*a*) labour is not a commodity; (*b*) freedom of expression and association are essential to sustained progress; and (*c*) poverty anywhere constitutes a danger to prosperity everywhere.

27. Experience has shown that the objectives stated in the Constitution of the ILO can be achieved only through a programme aimed at the welfare and development of the individual regarded as a human being and not merely as a wage-earner. That is why, in revising the Constitution at Montreal in 1946, the General Conference of the ILO expanded the general principles for regulating labour conditions set out in the final section of the aforementioned part XIII of the Treaty of Versailles into a statement of the essential features of a society in which those benefits could be realized. This would be a society in which "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".[12] The welfare of the individual in society was thus affirmed as the primary purpose of all.[13]

C. The Charter of the United Nations and the individual

28. The authors of the Charter of the United Nations (hereinafter referred to as the Charter) assumed the existence of a world community. But the Charter includes two concepts which are in conflict with each other. According to one of these concepts, the component units are States; the other concept focuses on individual human beings. In the organizational structure of the United Nations, the former concept is the most prominent one and finds expression in the most obvious procedures. It makes the primary task of the Organization that of restraining and constraining States. The latter concept expresses itself in other institutions, designed to relieve individual suffering, to promote human rights and fundamental freedoms for individuals everywhere, to create conditions of stability, well-being and progress, and to provide for services now regarded as necessary for the full development of the individual's personality in a democratic community.

29. Thus the Charter, in its Preamble, makes a specific reference to human rights, stating: "We the peoples of the United Nations, determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" and in Article 1, paragraph 3, it lays down as one of the purposes of the United Nations the achievement of international co-operation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Further, under article 56 of the Charter, all Members of the United Nations "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55", which, *inter alia*, include "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[14] Thus, while not giving a list of fundamental human rights and freedoms, the Charter none the less introduced the principle of respect for basic human

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[10] See, further, in connection with the protection of minorities, F. Ermacora, *Der Minderheitenschutz in der Arbeit der Vereinten Nationen* (Vienna, W. Braumüller, 1964); E. A. Daes, "Protection of minorities under the International Bill of Human Rights and the Genocide Convention" in *Xenion: Festschrift für Pan. J. Zepos* (Athens, Ch. Katsikalis, 1973), vol. II, p. 43.

[11] United Nations, *Treaty Series*, vol. 15, p. 35. In connection with the creation of the ILO and the principles of the Declaration of Philadelphia, see, among others, N. Valticos, *International Labour Law* (Deventer, Kluwer, 1979), pp. 18 and 19.

[12] Declaration concerning the Aims and Purposes of the International Labour Organisation article II (*a*).

[13] See, among others, C. W. Jenks, *Human Rights and International Labour Standards* (London, Stevens, 1960); and, for the jurisdiction and machinery of the ILO in the field of human rights, E. B. Haas, *Human Rights and International Action* (Stanford, California, Stanford University Press, 1970), pp. 25–30.

[14] See J. P. Humphrey, "The UN Charter and the Universal Declaration of Human Rights" in E. Luard, ed., *The International Protection of Human Rights* (London, Thames and Hudson, 1967), pp. 39–58; and I. Szabó and others, *Socialist Concept of Human Rights* (Budapest, Akadémiai Kiadó, 1966), pp. 279–298.

rights into international law, imposing corresponding obligations on States.[15]

30. The General Assembly is charged with the task of initiating studies and making recommendations for the purpose of assisting in the realization of human rights and fundamental freedoms for all. Also, under the authority of the General Assembly, the Economic and Social Council may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all, prepare draft conventions and convene conferences in furtherance of these objectives. The encouragement of respect for human rights and fundamental freedoms is declared to be one of the four basic objectives of the trusteeship system.

31. According to Article 73 of the Charter, Members of the United Nations

> which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

32. Moreover, in accordance with this solemn pledge, the colonial Powers undertook, under the terms of Article 73 of the Charter, to transmit regularly to the Secretary-General information on economics, social and educational conditions in the territories under their administration. Here, indeed, was a striking and practical assertion of collective concern for the welfare of about 150 million human beings over whom, until 1945, alien rulers had exercised a power that owed no account or report to any external authority.

33. However, it is important to note that the Charter nowhere grants any right to the individual which he can maintain against an oppressor.

34. Furthermore, the Statute of the International Court of Justice, which is an integral part of the Charter, expressly provides that only States may be parties in cases before the Court (Art. 34).

35. Nevertheless, the separate opinions of independent dissenting judges members of the International Court of Justice show a tendency to regard the protection of human rights as having become part of modern international law.[16]

36. In the South West Africa case (1966), Judge Jessup, in his dissenting opinion, declared:

> . . . The general philosophical views prevalent in the world certainly include the content of Articles 1, 55 and 73, of the Charter of the United Nations and the world-wide condemnation of apartheid.
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> . . .
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> . . . the accumulation of expressions of condemnation of apartheid as reproduced in the pleadings of Applicants in this case, especially as recorded in the resolutions of the General Assembly of the United Nations, are proof of the pertinent contemporary international standard.[17]

37. Judge Tanaka expressed himself in the following manner:

> The repeated references in the Charter to the fundamental rights and freedoms . . . presents itself as one of its differences from the Covenant of the League of Nations, in which the existence of intimate relationships between peace and respect for human rights were not so keenly felt as in the Charter of the United Nations. However, the Charter did not go so far as to give the definition to the fundamental rights and freedoms, nor to provide any machinery of implementation for the protection and guarantee of these rights and freedoms.
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> . . .
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> . . . From the provisions of the Charter referring to the human rights and fundamental freedoms it can be inferred that the legal obligation to respect human rights and fundamental freedoms is imposed on member States.
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> . . .
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> . . . the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterized as evidence of the international custom referred to in Article 38, paragraph 1 (*b*) [of the Court's Statute].
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> . . .
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> . . . we consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law . . .[18]

38. Judge Padilla Nervo expressed the following opinion, which is basically similar to those already quoted:

> A new order based on the proposition that "all men are by nature equally free and independent", has conquered solemn recognition in the basic law of many nations and is today . . . norm and standard in the constitutional practice of States.
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> . . .
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> The Court . . . is not limited by the strict enumeration of Article 38 [of its Statute], whose prescriptions it is free to interpret in accordance with the constant evolution of the concepts of justice, principles of law and teachings of publicists.
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> Racial discrimination as a matter of official government policy is a violation of a norm or rule or standard of the international community.[19]

39. In his separate opinion in the Namibia (South West Africa) case of 1971, Judge Ammoun, referring to the legitimacy of the peoples' struggle for their rights, which, he said, "cannot be in any doubt, for it follows from the right of self-defence, inherent in human nature, which is confirmed by Article 51 of the United Nations Charter",[20] asked the following question: "how is it possible not to recognize the binding force of principles and rights which the international commu-

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[15] G. I. Tunkin, *Theory of International Law* (London, Allen and Unwin, 1974), pp. 79–85.

[16] In its 1966 judgment on South West Africa the Court refused to accept this approach. See *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 34.

[17] *Ibid.*, pp. 439 and 441. About this case, see, *inter alia*, G. Elian, *The International Court of Justice* (Leyden, A.W. Sijthof, 1971), pp. 123–128.

[18] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, dissenting opinion of Judge Tanaka, pp. 288, 289, 292 and 293.

[19] *Ibid.*, dissenting opinion of Judge Padilla Nervo, pp. 457 and 464.

[20] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 70.

nity has agreed that it is legitimate to defend by force of arms?"[21] He cited the fact that the General Assembly and the Security Council of the United Nations had affirmed since 1966 "the legitimacy of the Namibian people's struggle, and that of all other dependent peoples, to defend their rights". More specifically, Judge Ammoun referred to General Assembly resolution 2396 (XXIII) of 2 December 1968, in which the General Assembly, referring to human rights and the struggle for their implementation, reaffirmed "its recognition of the legitimacy of the struggle of the people of South Africa for all human rights". In the opinion of Judge Ammoun, "the international community as a whole deems it legitimate to defend human rights by force of arms". From this he concluded that the General Assembly considers these human rights "to be peremptory rights endowed with effective sanction, or in other words that they are part and parcel of positive international law". Further, Judge Ammoun evoked Security Council resolution 282 (1970), ordering an embargo on the shipment of arms to South Africa. He declared that in doing so the Security Council "recognized" the legitimacy of the struggle of the oppressed people of South Africa in pursuance of their human and political rights as set forth in the Charter of the United Nations and the Universal Declaration of Human Rights.[22]

40. Finally, in its 1971 advisory opinion on Namibia, the International Court of Justice accepted the view that the Security Council, in its actions concerning this Territory, had been acting in accordance with Article 24 of the Charter, relating to the maintenance of international peace and security. The Court concluded that the relevant decisions of the Security Council were binding on all States Members of the United Nations, including those voting against them, and it further regarded non-members of the United Nations as being equally bound by them.[23]

41. The Charter, despite the way in which the Court and its members have interpreted it, does not of itself improve the lot of the individual; it should, however, not be overlooked that it opened a broad way for further development relating to the protection of the individual.

D. The international bill of human rights

42. In accordance with the principles of the Charter, the competent organs of the United Nations strove to formulate an international bill of human rights and to define the scope and extent of the inherent rights of man.

43. The task was not an easy one, given the heterogeneous character of the United Nations. It required arduous work, in particular by the members of the Commission on Human Rights and of the Third Committee of the General Assembly, to set forth common principles and standards which could be accepted equally by all the members of an organization built around the nucleus of the United Nations in time of war and consisting of States with conflicting or differing legal, economic and political systems, social and cultural traditions and outlook.

44. Thus it was that on 10 December 1948 the Universal Declaration of Human Rights was proclaimed. Its preamble closes with a proclamation by the General Assembly that the Declaration is "a common standard of achievement for all peoples". It did not purport to set out a law but rather an ideal, towards which "every individual and every organ of society . . . shall strive".[24]

45. This may be regarded as the first landmark in contemporary history in the development of the concept of human rights. In the process of the definition of human rights, the Universal Declaration may be accepted as the true Magna Carta of mankind.

46. However, the General Assembly of the United Nations was not satisfied with a mere declaration of human rights which did not have the legal force of a treaty. The competent United Nations organs therefore undertook the task of formulating a precise definition of human rights which could be embodied in a regular treaty open to signature and ratification and, therefore, capable of being enforced. It was in 1947 that the Commission on Human Rights was entrusted with the task of drafting the text of a covenant on human rights. The Economic and Social Council was asked to give its full co-operation in this endeavour and, ultimately, the Third Committee of the General Assembly was entrusted with this difficult task. After long debates the General Assembly resolved that two covenants should be drafted and that they should contain certain similar provisions to emphasize the unity of the aim in view, the recognition that the inherent dignity and the equal and inalienable rights of all members of the human family were the foundation of freedom, justice and peace in the world, and the obligation of States to ensure the universal respect for, and observance of, human rights and fundamental freedoms.

47. Thus, as a result of the continued efforts of all the competent organs of the United Nations, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant and Political Rights were adopted, on 16 December 1966.

48. The late Secretary-General of the United Nations, U Thant, stressed the importance of the adoption of the International Covenants by the following inspired words:

> Today's decisions are the culmination and the outcome of sustained and complex preparatory work to which the United Nations has devoted itself since 1947. It was then decided that human rights and fundamental freedoms which had been referred to in general terms in the Charter and which were soon to be proclaimed "standards of achievement" in the Universal Declaration of Human

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[21] *Ibid.*, p. 79

[22] *Ibid.* Judge Ammoun attempted to base the binding character of human rights on the principle of self-defence in implementing the purposes of the Charter of the United Nations (Art. 2, para. 4, and Art. 51). See, on this point, G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. III, *International Constitutional Law* (London, Stevens, 1976), pp. 162 and 163.

[23] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 51, 52, 53 and 58.

[24] With respect to the legal significance, impact and influence of the Universal Declaration, see part one, paras. 174–188.

> Rights must be made the subject matter of legally binding obligations in international treaties.
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> . . .
>
> . . . in the philosophy of the United Nations, respect for human rights is one of the main foundations of freedom, justice and peace in the world. . . .[25]

49. With the entry into force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights (hereinafter referred to as the International Covenants and the Optional Protocol),[26] the world community approaches a new and more difficult phase in the effective protection of the individual. The International Covenants confront each state party with the need to decide whether it is prepared to assume a binding commitment, and whether it is prepared to adjust its laws and practices to the agreed standards. The International Covenants and the Optional Protocol constitute a positive, effective and realistic step towards the international protection of the individual. They embody principles which profoundly affect the relationship between man and man, between the citizen and his State and between State and State.

E. Other international instruments relating to the protection of the individual

50. The International Bill of Human Rights is supplemented by a number of other instruments adopted by the United Nations, the specialized agencies or regional intergovernmental organizations which relate to the human rights and the duties of the individual.

51. Among these instruments, the ones described below are of some significance.

1. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE[27]

52. The aspect of protection of the individual that has aroused most emotional reaction flows from the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the Genocide Convention), which expanded the concept of crimes against humanity[28] as contained in the Nuremberg Principles and defined the liability for such crimes,[29] whether committed in time of war[30] or in time of peace.[31]

53. In its advisory opinion on reservations to the Genocide Convention, the International Court of Justice declared that it was the compatibility of a reservation with the object and purposes of the Convention that must furnish the criterion for making it or for objecting to it. The Court stated: "The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation". The Court further declared that the Genocide Convention

> was manifestly adopted for a purely humanitarian and civilizing purpose. It was indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.[32]

54. Since this Convention is already a binding international instrument, it can be accepted that the survival of national, ethnic, racial or religious groups is no longer dependent on the arbitrary will of the controlling State. The rescue and the protection of the victimized group is an international duty of the community of nations.

55. On paper the Genocide Convention appears to provide for the trial of those accused of genocide. It provides also for the creation of an international court with criminal jurisdiction, but until the creation of such a court, genocide is punishable by the courts of the country in which it has been committed.

56. The United Nations has so far not established an international tribunal to deal with the crime of genocide. The two Committees on International Criminal Jurisdiction which were appointed by the General

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[25] *Official Records of the General Assembly, Twenty-first Session, Plenary Meetings*, 1496th meeting, paras. 70 and 74.

[26] The International Covenant on Economic, Social and Cultural Rights entered into force on 3 January 1976 and the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights on 23 March 1976. In accordance with articles 28 to 32 of the International Covenant on Civil and Political Rights, the States parties at their first meeting elected the 18 members of the Human Rights Committee. By 3 November 1978, the Human Rights Committee had held five sessions and adopted its second annual report (see report of the Human Rights Committee, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 40* (A/33/40).

[27] Adopted by the General Assembly on 9 December 1948; entered into force on 12 January 1951. See "Study of the question of the prevention and punishment of the crime of genocide: study prepared by Mr. Nicodème Ruhashyankiko, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities" (E/CN.4/Sub.2/416); see also Daes, *loc. cit.*, pp. 69–86.

[28] Crimes against humanity, like crimes against peace, were covered by the creation of additional forms of extraordinary criminal jurisdiction. Prior to the Charters of the International Military Tribunals of Nuremberg (1945) and Tokyo (1946), these forms of extraordinary jurisdiction were unknown to international law. The principles introduced by the Nuremberg and Tokyo trials were subsequently endorsed by the General Assembly of the United Nations in its resolution 95 (I) of 11 December 1946 entitled "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal". In 1947, the International Law Commission was requested to formulate the principles of international law recognized in the Charter and the judgement of the Nürnberg Tribunal and to prepare a draft code of offences against the peace and security of mankind (General Assembly resolution 177 (II) of 21 November 1947). Taking into account the observations of various Governments, the International Law Commission adopted in 1954 a draft Code of Offences against the Peace and Security of Mankind (*Official Records of the General Assembly, Ninth Session Supplement No. 9* (A/2893), chap. III). See also J. Spiropoulos, "Formulation of the Nürnberg Principles", *Revue hellénique de droit international*, 4th year, No. 2 (1951), pp. 129–162.

[29] A. Klafkowski, *The Nuremberg Principles and the Development of International Law* (Warsaw, Zachodnia Agencja Prasowa, 1966), p. 46.

[30] G. Maridakis, "Un précédent du procès de Nuremberg tiré de l'histoire de la Grèce ancienne", *Revue hellénique de droit international*, 5th year, Nos. 1-2 (1952), pp. 1–16.

[31] On war crimes and crimes against humanity, see also *United Nations Action in the Field of Human Rights* (United Nations publication, Sales No. E.74.XIV.2), pp. 120–121.

[32] *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 23.

Assembly and met in 1951 and 1953, respectively, prepared only the draft of a statute of an international court.[33]

2. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION[34,35]

57. The International Convention on the Elimination of All Forms of Racial Discrimination provides, in article 1, paragraph 1, that

> the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Thus, the concept "racial discrimination" is a composite concept: it requires that there take place a certain action or omission described as "distinction, exclusion, restriction or preference", that the action or omission, to come within the definition (and therefore to be covered by the provisions of the Convention), must be based on certain grounds, namely, "race, colour, descent, or national or ethnic origin", and that the action must have a certain purpose or effect—that of "nullifying or impairing the recognition, enjoyment or exercise . . . of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

58. With regard to the grounds for the objectionable action or omission, the Convention, although its aims are very significant, is narrower in its scope than other United Nations instruments.

59. In particular the Charter forbids distinctions "as to race, sex, language, or religion".[36]

60. The Universal Declaration of Human Rights adds "colour, . . . political or other opinion, national or social origin, property, birth or other status" (art. 2) to the categories listed in the Charter. The International Covenant on Civil and Political Rights (arts. 2, para. 1, and 24, para. 1) and the International Covenant on Economic, Social and Cultural Rights (art. 2, para. 2) adopt the list contained in the Universal Declaration.

61. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination lists political rights, a series of economic, social and cultural rights and the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks. Article 5 (*d*) lists a category of rights which is expressly and *eo nomine* described as "other civil rights". It includes, among others, the right to freedom of movement and residence and the right to leave any country, including one's own, and to return to one's country.

62. Under the same article, States parties undertake to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the rights listed in that article. The representative of India had suggested that the text of article 5 should be more flexible and that, by the deletion of the words "the right of everyone", States parties should be left free to decide for themselves whether the same guarantees should be afforded to aliens and nationals. Nevertheless, the words "the right of everyone" have remained in the text of article 5.

63. Article 2, paragraph 1, sets forth in general terms the obligations which States undertake in the matter of racial discrimination. Some of these fundamental obligations are spelt out in greater detail in articles 3 to 7.

64. The States parties first condemn racial discrimination, racial segregation and *apartheid* and, secondly, undertake to pursue by all appropriate means a policy of eliminating racial discrimination, eradicating practices of this nature in territories under their jurisdiction, and undertake to promote understanding among all races.[37]

65. Under article 6, States parties are required to assure to everyone within their jurisdiction effective protection and remedies against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to the Convention. This protection is to be afforded and these remedies are to be granted by "the competent national tribunals and other State institutions". The word "national" in "national tribunals" means municipal as distinct from international tribunals.

66. The victim is entitled to seek "just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination".

67. The principle that the municipal legal systems shall provide remedies against the violation of human rights is set forth in article 8 of the Universal

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[33] In connection with the question of universal jurisdiction, see the conclusions and recommendations contained in chapter X of the study of the question of the prevention and punishment of the crime of genocide (E/CN.4/Sub.2/416) and the report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its thirty-first session (E/CN.4/1296), paras. 233–242.

[34] Adopted by the General Assembly on 21 December 1965; entered into force on 4 January 1969.

[35] This section is based on E. Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", *The International and Comparative Law Quarterly*, vol. 15, part 4 (October 1966), pp. 996–1068.

[36] Charter of the United Nations, Art. 1, para. 3; Art. 13, para 1 b; Art. 55 c; and Art. 76 c.

[37] In This connection, the General Assembly, by its resolution 3057 (XXVIII) of 2 November 1973, designated the ten-year period beginning on 10 December 1973 as the Decade for Action to Combat Racism and Racial Discrimination, and approved a Programme for the Decade. The Programme proposed, *inter alia*, a series of international and regional measures, including a world conference on combating racial discrimination; this Conference took place in Geneva from 14 to 25 August 1978. The Programme also provided for the establishment of an international fund on a voluntary basis to help the peoples struggling against racial discrimination and *apartheid*. For the Declaration and Programme of Action adopted by the Conference, see *Report of the World Conference to Combat Racism and Racial Discrimination*, Geneva, 14–25 August 1978 (United Nations publication, Sales No. E.79.XIV.2). See also the reports of two United Nations seminars: *Seminar on the Elimination of All Forms of Racial Discrimination*, New Delhi, India, 27 August–9 September 1968 (ST/TAO/HR/34); and *Seminar on Measures to be Taken on the National Level for the Implementation of United Nations Instruments Aimed at Combating and Eliminating Racial Discrimination and for the Promotion of Harmonious Race Relations: Symposium on the Evils of Racial Discrimination*, Yaoundé, Federal Republic of Cameroon, 16–29 June 1971 (ST/TAO/HR/42).

Declaration of Human Rights, which reads: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The same principle is included in article 2, paragraph 3, of the International Covenant on Civil and Political Rights.

68. The phrase "everyone within their jurisdiction" in article 6 of the Convention must be read in conjunction with article 1, paragraph 2, which limits the extent to which non-citizens are under the protection of the Convention. The manner in which the internal law of a State party is to be adjusted, if necessary, to the State's obligations arising from the Convention depends on the constitutional processes and arrangements of each State.

69. In United Nations terminology the contemplated arrangements for international machinery have become known as "measures of implementation".

70. The measures of implementation of the Convention are of considerable complexity. The Convention establishes a Committee on the Elimination of Racial Discrimination, consisting of 18 individuals, "experts of high moral standing and acknowledged impartiality", who are elected by States parties from among their nationals. The functions of the Committee are: (*a*) to consider reports received from Governments and to make suggestions and general recommendations based on an examination of them; (*b*) to handle, with a view to effecting a settlement, some of the stages of inter-State disputes concerning the application of the Convention, other functions being performed by the *ad hoc* Conciliation Commission (comprising five persons who may or may not be members of the Committee); (*c*) to receive and consider communications from individuals or groups of individuals claiming to be victims of a violation of any of the rights set forth in the Convention by a State party which has made the declaration provided for in article 14 thereof; (*d*) to co-operate with competent United Nations organs in matters of petitions from the inhabitants of non-independent territories; and (*e*) to report annually on its activities to the General Assembly.

71. The Convention further provides for a reporting system. The rendering of reports to an international authority is a procedure of long standing used for the supervision of the performance of international obligations.[38] This is a "measure of implementation" which is more acceptable to Governments than judicial proceedings and arrangements for the quasi-judical settlement of complaints.

72. Finally, article 16 of the Convention attempts to solve one aspect of the complex problem of the co-ordination of international procedures. The provisions of the Convention "concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or in conventions adopted by, the United Nations and its specialized agencies". The phrase "without prejudice to other procedures" means that the Convention does not repeal the provisions which are the basis of the "other procedures".

73. Accordingly, the International Convention on the Elimination of All Forms of Racial Discrimination does not affect the right of a State party to, for example, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), to file with the ILO a complaint under article 26 (1) of the Constitution of the ILO that another State party to the same Convention is not securing its effective observance.[39] None the less, article 16 is silent on the "recourse to other procedures" which is available to individuals under other instruments of regional importance such as the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[40] Although, as mentioned above, article 16 of the Convention does not state so expressly, it cannot have been the intention of the General Assembly or of the States parties to affect the rights of the individual arising from other procedures, e.g., from article 25 of the European Convention.

3. International Convention on the Suppression and Punishment of the Crime of *Apartheid*[41]

74. The racial policies of the Government of South Africa have been before the United Nations since the first session of the General Assembly in 1946. In that year, India brought before the General Assembly a complaint that the Government of South Africa had enacted legislation which discriminated against South Africans of Indian origin. Since then the racial policies of the Government of South Africa have been under consideration by the General Assembly, the Security Council and other United Nations organs and bodies,[42] as well as by the specialized agencies[43] and non-governmental organizations.[44]

75. Thus, resolutions adopted by the General Assembly and other United Nations organs and bodies reflect the mounting concern of world opinion about the racial situation within South Africa and the frustration occasioned by the refusal of its Government

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[38] See: Covenant of the League of Nations, Art. 22, para. 7; Charter of the United Nations, Arts. 73 e, 87 a and 88; Constitution of the ILO, as amended in 1946, art. 19 (5) (*e*); Constitution of UNESCO, art. VIII.

[39] I. Brownlie, ed., *Basic Documents on Human Rights* (Oxford, Clarendon Press, 1971), pp. 296–304.

[40] Signed at Rome, 4 November 1950. See United Nations, *Treaty Series*, vol. 213, p. 221.

[41] Adopted by the General Assembly on 30 November 1973; entered into force on 18 July 1976.

[42] See, for example, the report by M. Ganji entitled "Study of *apartheid* and racial discrimination in southern Africa: report of the Special Rapporteur" (E/CN.4/979 and Add.1 and Add.1/Corr.1 and Add.2–8). See also *United Nations Action in the Field of Human Rights* (United Nations publication, Sales No. E.74.XIV.2), pp. 41–46.

[43] See, for example, *Apartheid: Its Effects on Education, Science, Culture and Information*, 2nd ed. (Paris, UNESCO, 1972); *The I.L.O. and Human Rights: Report of the Director-General (Part I) to the International Labour Conference, Fifty-second Session, 1968* (Geneva, ILO, 1968), pp. 51–62. See also R. Austin, *Racism and Apartheid in Southern Africa* (Paris, UNESCO, 1975).

[44] See International Commission of Jurists, various reports and studies appearing in *The Review*, in particular the report on South Africa in No. 10, June 1973, pp. 21–23.

to respond to the repeated appeals by the world Organization to bring its policies into conformity with the Charter. For example, General Assembly resolution 395 (V) of 2 December 1950 states that "a policy of 'racial segregation' (*Apartheid*) is necessarily based on doctrines of racial discrimination".

76. In August 1963, the Security Council recommended that the sale and shipment of all arms, ammunition and military vehicles to South Africa should stop.

77. Further, the United Nations Secretary-General, U Thant, declared:

> The United Nations family firmly believes that racial discrimination and *apartheid* are a denial of human rights, of fundamental freedoms, and of justice, and that they are an affront to human dignity. We feel that racial discrimination and *apartheid*, wherever they are practised, constitute a serious impediment to economic and social development and are obstacles to international co-operation and peace.[45]

78. The Special Rapporteur considers that the Government of South Africa set out on the path to *apartheid* as the frightened response of a white minority to the challenge of democracy in a multiracial State with an overwhelming black majority.[46]

79. The States parties to the International Convention on the Suppression and Punishment of the Crime of *Apartheid* declare that *apartheid* is a crime against humanity and that inhuman acts resulting from the policies and practices of *apartheid*[47] and similar policies and practices of racial segregation and discrimination as practised in southern Africa are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security (arts. I and II).

80. The term "the crime of *apartheid*" is defined in article II of the Convention as applying to a number of inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.

81. The Convention also establishes that international criminal responsibility shall apply to individuals, members of organizations and institutions and representatives of the State, whenever they commit or are involved in the commission of the crime of *apartheid* (art. III).[48]

82. Persons charged with the acts enumerated in article II of the Convention may be tried by a competent tribunal of any State party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States parties which shall have accepted its jurisdiction (art. V).

83. It should also be mentioned that the Convention provides that the acts enumerated in its article II shall not be considered political crimes for the purpose of extradition. The States parties undertake in such cases to grant extradition in accordance with the treaties in force (art. XI).

84. Under article X of the Convention, a kind of co-operation between several organs and bodies of the United Nations is established. Thus, the Commission on Human Rights is, *inter alia*, empowered to request United Nations organs, when transmitting to it copies of petitions under article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination, to draw its attention to complaints concerning acts which are enumerated in article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.

85. The Commission on Human Rights is also empowered under article X to prepare, on the basis of reports from competent organs of the United Nations and periodic reports from States parties to the Convention, a list of individuals, organizations, institutions and representatives of States which are alleged to be responsible for the crimes enumerated in article II of the Convention, as well as those against whom legal proceedings have been undertaken by States parties to the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.

4. CONVENTIONS RELATING TO NATIONALITY, STATELESSNESS AND REFUGEES

(a) *The law of nationality in general*

86. "Nationality" is a term used to denote the primary legal connection between an individual and a State, but it is an inconstant expression employed for different purposes in international law and in municipal law, and in different contexts in both. There is no necessary coincidence between the meanings of the term as used internationally and domestically.[49] Nationality is a pre-condition for certain international activity but not in itself the basis thereof.[50]

87. The term "citizen" is likewise used ambiguously. In some States, "citizenship" is a term indicative of the extent of the rights, duties and privileges of a given category of nationals.

88. Nationality is relevant in international law (*a*) in the question of jurisdiction over persons and (*b*) as forming the basis for the international protection of the individual by a State.

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[45] Message by the late Secretary-General, U Thant, issued on 21 March 1967, proclaimed by the General Assembly in resolution 2142 (XXXI) as the International Day for the Elimination of Racial Discrimination. See *Portfolio for Peace: Excerpts from the Writings and Speeches of U Thant, Secretary-General of the United Nations, on Major World Issues 1961–1970* (United Nations publication, Sales No. E.70.I.24), p. 125. In connection with United Nations activities relating to the elimination of racial discrimination and *apartheid*, see, *inter alia*, the reports of the seminars held in New Delhi, India, in 1968 (ST/TAO/HR/34) and Yaoundé, Federal Republic of Cameroon, in 1971 (ST/TAO/HR/42). Another seminar on the subject was held in Havana, Cuba, from 24 to 28 May 1976: the International Seminar on the Eradication of *Apartheid* and in Support of the Struggle for Liberation in South Africa, organized by the United Nations Special Committee against *Apartheid* in consultation with the Organization of African Unity; for the final documents, messages, etc., see United Nations, Centre against *Apartheid*, *Notes and Documents*, SEM/1, June 1976.

[46] Daes, *loc. cit.*, p. 55, note 53.

[47] See, for instance, H. Santa Cruz, *Racial Discrimination* (United Nations publication, Sales No. E.76.XIV.2), paras. 496–779.

[48] See also part one, paras. 121–136.

[49] D. P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol. II, p. 670.

[50] Concerning the "principle of nationality", see also G. I. Tunkin, *op. cit.*, p. 61.

89. Under the auspices of the United Nations a number of international instruments have been adopted with respect to the questions of nationality, statelessness and refugees.

(b) *Convention on the Nationality of Married Women*[51]

90. Under the Convention on the Nationality of Married Women the Contracting States agree, *inter alia*, that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during the marriage, shall automatically affect the nationality of the wife (art. 1). They also agree that the alien wife of a national of one of the Contracting States may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures, although the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy (art. 3).

(c) *Convention relating to the Status of Refugees*[52]

91. The first treaty that provided an international status for refugees was the Convention relating to the International Status of Refugees, 1933.[53]

92. This was followed by the Convention relating to the Status of Refugees Coming from Germany[54] of 1938. Both Conventions were replaced as between the parties by the more extended Convention relating to the Status of Refugees, 1951.[55]

93. Under article 1 of the Convention relating to the Status of Refugees, the term "refugee" applies to any person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization. It applies also to any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

94. The parties to the Convention have undertaken to apply to refugees treatment at least as favourable as that accorded to their own nationals with regard to certain rights, such as freedom to practise their religion, access to courts, elementary education, social security and public relief. The treatment accorded to refugees with respect to property rights is to be not less favourable than that accorded to aliens generally (art. 13).[56] In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights of literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence (art. 14). The Convention authorizes the parties to issue travel documents to refugees, which other parties must recognize (art. 28).

95. Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order (art. 2).

96. The Convention further stipulates that no contracting State shall expel or return ("refouler") a refugee against his will to the frontiers of territories of the country from which he escaped or of a country where his life or liberty would be threatened because of his race, nationality, political opinion, religious beliefs or membership of a particular social group. The benefit provided for by the principle of prohibition of expulsion or return ("refoulement") may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country (art. 33).

97. By the Protocol relating to the Status of Refugees, the requirement relating to the date 1 January 1951 was deleted and the contracting parties to the Protocol undertook to apply it on a world-wide basis.

98. Persons displaced within their own country as a result of disturbances, civil wars, or military invasion, or any form of foreign occupation[57] or action do not come within the mandate of the United Nations High Commissioner for Refugees.

99. As for the particular case of refugees from Palestine, a special organization was set up in 1949, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), which is responsible for providing this category of refugees with shelter, food, health and social services and education, pending a permanent solution to the problems in the Middle East.

100. The General Assembly has adopted resolutions on the right of asylum, including resolution 2312 (XXII), which embodied the Declaration on Territorial

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[51] Opened for signature and ratification by General Assembly resolution 1040 (XI) of 29 January 1957; entered into force on 11 August 1958.

[52] Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950; entered into force on 22 April 1954.

[53] League of Nations, *Treaty Series*, vol. 159, p. 199.

[54] *Ibid.*, vol. 192, p. 59.

[55] See also the Protocol relating to the Status of Refugees, which entered into force on 4 October 1967, and the Statute of the Office of the United Nations High Commissioner for Refugees, which was adopted by the General Assembly on 14 December 1950.

[56] See Baroness Elles, *op. cit.*, paras. 118–140.

[57] This is the case with about 200,000 displaced persons in Cyprus. See, *inter alia*, Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1 (XXVIII) and the report of the Sub-Commission on its twenty-eighth session (E/CN.4/1180), paras. 123–127. See also the reports of the Secretary-General on the United Nations operation in Cyprus, for the period 7 December 1976 to 7 June 1977 (S/12342, para. 36) and for the period 8 June 1977 to 30 November 1977 (S/12463, para. 43).

Asylum, under which all States are called upon to respect asylum granted by a State in the exercise of its sovereignty but the right to benefit from asylum may not be invoked by persons who have committed war crimes or crimes against peace and humanity.

(d) *Convention relating to the Status of Stateless Persons*[58]

101. With regard to the abolition of statelessness, a status which is both derogatory to the dignity of the individual and a reflection upon the logic of traditional international law, which makes the possession of nationality the only link (see para. 88 above) between the individual and the benefits and duties of international law, the United Nations has made substantive progress by the adoption of the Convention relating to the Status of Stateless Persons.

102. The term "stateless person" means a person who is not considered a national by any State under the operation of its law (art. 1).

103. The Convention provides for the duties of the stateless person to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order (art. 2).

104. With regard to most matters, the treatment accorded to stateless persons is the same as that accorded to refugees under the Convention relating to the Status of Refugees.[59] Thus, article 3, which is similar in the two Conventions, provides: "The Contracting States shall apply the provisions of this Convention to stateless persons [refugees] without any discrimination as to race, religion or country of origin."

105. None the less, as regards certain rights, stateless persons are placed in a position less favourable than that of refugees; for example, with regard to the right of association and wage-earning employment, the Contracting States are required to accord to stateless persons lawfully staying in their territory treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally in the same circumstances (arts. 15 and 17).

(e) *Convention on the Reduction of Statelessness*[60]

106. To the extent that States are free to bestow their nationality, they also have the power to take it away.

107. By means of conventions, attempts have been made to alleviate the position of stateless persons. Otherwise, they are objects of international law for whom no subject of international law is internationally responsible.

108. One of these conventions is the Convention on the Reduction of Statelessness. A long time before its adoption, the Economic and Social Council, in its resolution 116 D (VI) of March 1948, recognized that the problem of stateless persons "demands . . . the taking of joint and separate action by member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality" and requested the Secretary-General to undertake a study on statelessness[61] and to submit recommendations to the Council as to the desirability of concluding a further convention on the subject.

109. In 1953 and 1954 the International Law Commission prepared a draft Convention on the Elimination of Future Statelessness, the purpose of which was to solve the problem of statelessness and to eliminate statelessness as regards States parties. Some members of the International Law Commission took the view that a less ambitious instrument would constitute a more practicable solution of the problem and the Commission therefore prepared, as an alternative, a draft Convention on the Reduction of Future Statelessness. In 1954 the General Assembly decided by resolution 896 (IX) that an international conference of plenipotentiaries should be convened to conclude a convention for the reduction or elimination of future statelessness.

110. This Conference was convened in 1959 and again in 1961, and it produced the Convention on the Reduction of Statelessness.

111. The most important provisions of the Convention can be summarized as follows. A contracting State is required to grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality is to be granted (a) at birth, by operation of law, or (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. The contracting State may, however, make the granting of this nationality subject to certain conditions (art. 1).

112. A foundling found in the territory of a contracting State is, in the absence of proof to the contrary, to be considered to have been born within that territory of parents possessing the nationality of that State (art. 2).

113. If the law of a contracting State entails loss of nationality as a consequence of any change in the personal status of a person, such as marriage, legitimation, recognition or adoption, such loss is to be conditional upon possession or acquisition of another nationality (art. 5). A contracting State may not deprive a person of his nationality if such deprivation would render him stateless (art. 8). However, the Convention recognizes certain exceptions to this rule.

114. Further, a contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds (art. 9).

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[58] Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened under Economic and Social Council resolution 526 A (XVII) of 26 April 1954; entered into force on 6 June 1960.

[59] See E. W. Vierdag, *The Concept of Discrimination in International Law with Special Reference to Human Rights* (The Hague, Nijhoff, 1973), p. 38. See also para. 109 below.

[60] Adopted on 30 August 1961 by a Conference of Plenipotentiaries which met in 1959 and reconvened in 1961 in pursuance of General Assembly resolution 896 (IX) of 4 December 1954; entered into force on 13 December 1975.

[61] For the Secretariat study, see "Study on the position of stateless persons, presented by the Secretary-General" (E/1112 and Add.1 and 2).

5. CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (EUROPEAN CONVENTION ON HUMAN RIGHTS)[62] AND ITS PROTOCOLS[63]

115. The contracting parties to the European Convention on Human Rights, considering, *inter alia*, the Universal Declaration of Human Rights and inspired by the aim of the Council of Europe, which is the achievement of greater unity between its members, reaffirmed their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend (preamble).

116. Also in the preamble, the contracting parties stated their resolve, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law,[64] to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.

117. The European Convention was the first international instrument to give specific legal content to human rights and to combine this with the establishment of machinery for supervision and enforcement.

118. One of the main preoccupations of those who are watching the administration of the European Convention is the extent to which the Convention affects the status of the individual vis-à-vis his own Government, that is to say, the extent to which the international machinery devised by the drafters of the European Convention is improving the status of the individual as it results from the municipal law of his own country.[65] This is not the sole concern of the European Convention, but it is probably the aspect which has attracted the greatest popular attention.

119. The most important part of the European Convention is devoted to the remedies available to the individual before the organs set up under the Convention,[66] because remedies for the individual under certain circumstances are more important than rights.

120. Another point that is important for the protection of the individual, and that could be considered collateral to the international remedies and procedures prescribed by the European Convention, is its national application and enforcement.

121. Thus, article 1 reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention."

122. It is a general principle of the law of treaties that, provided a State duly performs the obligations of a treaty, it can do so in such manner and through the instrumentality of such organs as it may choose, except in so far as the treaty may specify any particular procedure for doing so.[67] In particular, a State party to a treaty which involves any performance within the jurisdiction of that State is under no obligation to embody the treaty in legislation if its existing law already equips it to perform the treaty. The question whether or not it is necessary for a State ratifying the European Convention to pass legislation depends upon the state of its existing law, which may or may not be already adequate to ensure performance, and upon its constitutional law and practice. In the case of some States, the effect of ratifying the European Convention is to incorporate its provisions, *ipso facto* or by means of legislation, in the national law of that country, with the result that these provisions can be invoked in national courts in addition to the remedies afforded by the Convention. This is an incidental and collateral means of applying the European Convention, and instances of resort to it are already beginning to accumulate.[68]

6. INTER-AMERICAN INSTRUMENTS[69]

123. Concern for human rights in the sense of a passion for liberty and freedom and resistance to exploitation of the individual reaches back to the independence of the American States.[70] The Charter of the Organization of American States (OAS)[71] proclaims as the foundation of the inter-American system "a system of individual liberty and social justice based on respect for the essential rights of man".

124. What is more significant, however, is the relation of human rights to the regional security system represented by OAS. The "Protocol of Buenos Aires",[72] which revised the Charter of OAS, entered into force in 1970. It changed the legal status of the

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[62] See footnote 40.

[63] The European Convention is supplemented by five Protocols. See A. H. Robertson, *Human Rights in Europe*, 2nd ed. (Manchester University Press, 1977).

[64] These aspects were well summarized by the following speakers when the European Convention was signed at the sixth session of the Committee of Ministers of the Council of Europe in Rome in 1950. Thus, Mr. Sean MacBride said: "The present struggle is one which is largely being fought in the minds and consciences of mankind. In this struggle, I have always felt that we lacked a clearly defined charter which set out unambiguously the rights which we democrats guarantee to our people. This Convention is a step in that direction". And Mr. Robert Schuman added: "This Convention which we are signing is not as full or as precise as many of us would have wished. However, we have thought it is our duty to subscribe to it as it stands. It provides foundations on which to base the defence of human personality against all tyrannies and against all forms of totalitarianism". See Robertson, *op. cit.*, p. 5.

[65] M. Sorensen, "Obligations of a State party to a treaty as regards its municipal law", and A. Verdross, "Status of the European Convention in the hierarchy of rules of law", in A. H. Robertson, ed., *Human Rights in National and International Law* (Manchester, Manchester University Press, 1968), pp. 11–46 and 47–74 respectively.

[66] See part two, paras. 653–667 below.

[67] Lord McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), chap. XIX.

[68] For example, in the Federal Republic of Germany and in the Netherlands.

[69] This section is based on the article by T. Buergenthal entitled "The revised OAS Charter and the protection of human rights" in *American Journal of International Law*, vol. 69, 1975, pp. 828–836.

[70] See, among others, H. Gros Espiell, "Le système interaméricain comme régime régional de protection internationale des droits de l'homme", *Recueil des cours de l'Académie de droit international de La Haye*, 1975–II (Leiden, A.W. Sijthoff, 1976), pp. 7–55.

[71] Signed on 30 April 1948. See United Nations, *Treaty Series*, vol. 119, p. 3.

[72] Signed on 27 February 1967. See United Nations, *Treaty Series*, vol. 721, p. 324.

Inter-American Commission on Human Rights and strengthened the normative character of the American Declaration of the Rights and Duties of Man (see para. 127 below).

125. The Charter of OAS contains a number of general human rights provisions. The most important is article 5 (*j*) which declares that "the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex". However, the Charter of OAS neither defined the rights mentioned in article 5 (*j*) nor established any procedures to ensure their implementation.

126. The Conference that produced the OAS Charter also proclaimed the American Declaration of the Rights and Duties of Man,[73] which was based on a revision of a draft first prepared in 1946 by Inter-American Juridical Committee. The Declaration was not intended to be binding, and its status was that of a recommendation of the Conference. A year later, the Inter-American Juridical Committee ruled that it was obvious that the Declaration of Bogotá did not create a legal contractual obligation and that, consequently, it lacked the status of "positive substantive law".

127. In 1959 the Fifth Meeting of Consultation of Ministers of Foreign Affairs adopted a resolution[74] establishing an Inter-American Commission on Human Rights, composed of seven members, elected in their individual capacity by the Council of OAS. The statute described the Commission as an autonomous entity of the OAS the function of which was to promote respect for human rights. It further declared that "for the purpose of this Statute, human rights are understood to be those set forth in the American Declaration of the Rights and Duties of Man". Thus, the principles proclaimed in the Declaration became the standards to be applied by the Commission in exercising its functions.

128. In 1969, an American Convention on Human Rights was adopted.[75] It came into force on 18 July 1978.

129. The Convention provides for a Commission and a Court and bears a general resemblance to the European Convention on Human Rights.

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[73] See *Final Act of the Ninth International Conference of American States, Bogotá, Colombia, March 30–May 2, 1948* (Washington, D.C., Pan American Union, 1948), resolution XXX.

[74] See *Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12–18, 1959: Final Act*, OAS, Official Records, OEA/Ser.C/II.5 (Washington, D.C., Pan American Union, 1960), p. 10, resolution VIII.

[75] For the text, see OAS, *Treaty Series*, No. 36 (Washington, D.C., General Secretariat of OAS, 1970).

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Part one

DUTIES OF THE INDIVIDUAL TO THE COMMUNITY

Chapter I

GENERAL OBSERVATIONS

1. The Universal Declaration of Human Rights, the most significant universal statement of fundamental human rights and freedoms, which the General Assembly of the United Nations proclaimed as a common standard of achievement for all peoples and all nations, does not affirm in detail the duties and obligations of the individual in relation to the State, for the simple reason that the cardinal object of the Declaration is the protection of the rights of individuals in relation to the State. History has shown that there is a need for such protection, whereas there is no imperative necessity to safeguard the State against individuals.

2. Paragraph 1 of article 29 of the Declaration contains a provision explicitly establishing duties for individuals: "Everyone has duties to the community." The reason for this provision is also given in the same paragraph: it is only within the community that the "free and full development of his personality is possible". The Special Rapporteur considers that this provision is of a moral nature in the sense that it lays down a general rule for individual behaviour in the community to which the individual belongs.

3. It is the belief of the Special Rapporteur that the fifth preambular paragraph of the International Covenants is also based on the above-mentioned ideas and principles. This paragraph says that the States parties to the Covenants realize that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the Covenants.[1]

4. Further, the Special Rapporteur is of the opinion that the norms governing the duties of the individual to the community are expressed both in article 29 and in article 30 of the Universal Declaration. Thus, paragraph 1 of article 29 spells out the notion of human duty, while article 30 contains the universally applicable norm governing interpretation.

5. The entire scope of human duties and the problems which arise from them are bound together in articles 29 and 30 of the Declaration. Indeed, the provisions of these two important articles constitute the key to the understanding of human rights and fundamental freedoms on the one hand, and of human duties on the other.

A. Preparatory work relating to article 29, paragraph 1, of the Universal Declaration of Human Rights

6. Paragraph 1 of article 29 of the Universal Declaration of Human Rights provides: "Everyone has duties to the community in which alone the free and full development of his personality is possible." This formulation constitutes a compromise text unanimously adopted by the General Assembly at its historic meeting of 10 December 1948.

7. The following account of the complex preparatory work relating to this paragraph illustrates the difficulties faced in arriving at a proper and balanced wording by the delegations representing different political, legal, economic, social and cultural systems at the Conference of San Francisco and later at the United Nations. This preparatory work also shows the different approaches to the problem of providing for human duties in the Declaration, and the importance attached by various delegations to the relationship between human rights and human duties.

1. The San Francisco Conference

8. It may be recalled that at the United Nations Conference on International Organization (San Francisco, 1945), which drafted the Charter of the United Nations, a proposal was submitted which contained a declaration on the essential rights of man, which was to be appended to the Charter and become an integral part of it.

9. One paragraph of the preamble of the proposed declaration related to the duties of individuals to the community. It read as follows:

> In society complete freedom cannot be attained; the liberties of the one are limited by the liberties of others, and the preservation of freedom requires the fulfilment by individuals of their duties as members of society.[2]

10. The Conference did not proceed with this proposal, stating that it required more detailed consideration.

2. Commission on Human Rights

11. When the terms of reference of the Commission on Human Rights were laid down by the Economic and Social Council in February 1946, "An international bill of rights" was the first item on its work programme. Consequently, it had before it various relevant documents, among them a draft resolution proposing the adoption by the General Assembly of a "General Act on Human Rights". This draft resolution, after enumerating certain rights, provided that:

> Nothing mentioned in this Act shall be construed as not obligating

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[1] In connection with the legal significance of the fifth preambular paragraph of the International Covenants, see paras. 189–195 below.

[2] United Nations Conference on International Organization, document G/7 (g) (2).

the individual to his corresponding duties to his own State and to the international community under the United Nations.[3]

12. At its second session (6–17 December 1947), the Commission had before it the report of the Drafting Committee, to which were annexed various drafts that contained provisions referring to human duties. Thus, in the draft outline of an international bill of human rights prepared by the United Nations Secretariat, one of the principles proposed for inclusion in the preamble read as follows: ". . . man does not have rights only; he owes duty to the society of which he forms part."[4]

13. Article 1 of the same draft outline provided that:

> Everyone owes a duty of loyalty to his State and to the (international society) United Nations. He must accept his just share of responsibility for the performance of such social duties and his share of such common sacrifices as may contribute to the common good.[5]

14. Further, other suggestions for articles of an "international declaration of human rights" contained the following provisions relevant to human duties:

> *Article 3.* As human beings cannot live and achieve their objects without the help and support of society, each man owes to society fundamental duties which are: obedience to law, exercise of a useful activity, acceptance of the burdens and sacrifices demanded for the common good.[6]

15. The Drafting Committee itself, in its suggestions for articles of the international declaration of human rights, included the following texts relating to the individual's duties to the community:

> *First alternative* (three articles, one of which referred to duties):
>
> . . .
>
> *Article 3.* As human beings cannot live and develop themselves without the help and support of society, each one owes to society fundamental duties which are: obedience to law, exercise of a useful activity, willing acceptance of obligations and sacrifices demanded for the common good.
>
> . . .
>
> *Second alternative* (one article only, referring to the limitations of human rights and to the duties of the individual):
>
> *Article 2.* . . . Man also owes duties to society through which he is enabled to develop his spirit, mind and body in wider freedom.[7]

16. A working group, established by the Commission, produced the following text for the second sentence of article 2 of the draft international declaration of human rights:

> The individual owes duties to society through which he is enabled to develop his spirit, mind and body in wider freedom.[8]

17. During a short debate on this article[9] several amendments to it were submitted. One of these read as follows:

> In the exercise of their rights, everyone must recognize the rights of others and his obligation to society so that all men may develop their spirit, mind and body in wider freedom.

The author of this amendment stated that he preferred a broader text, proclaiming the rights of individuals and their obligations to society for the creation of a more liberal atmosphere.

18. The Commission rejected the amendments and adopted the second sentence of article 2 as drafted by the working group.

19. At its third session (24 May–18 June 1948), the Commission had before it proposals relating to the duties of the individual and the limitations on his rights, which were contained in the comments from Governments on the draft international declaration of human rights, on the draft international covenant on human rights, and on the question of implementation. These proposals read as follows:

> Man owes duties to the society which allows him to shape and freely develop his personality. In their discharge, the right of each is limited only by the rights of others and by the just laws of the democratic State.[10]

and:

> All men are members of communities and as such have the duty to respect the rights of their fellow men equally with their own.
>
> The just claims of the state, which all men are under a duty to accept, must not prejudice the respect of man's right to freedom and equality before the law and the safeguard of human rights, which are primary and abiding conditions of all just government.[11]

20. In support of the proposals referring to the duties of the individual, it was stated that the duties which man owed to society should not be mentioned if those duties were left undefined.[12]

21. In the course of the debate the following oral amendment was also proposed:

> In the exercise of his rights everyone is limited by the rights of others and by his duties to the democratic society which enables him freely to develop his spirit.[13]

22. The author of the amendment pointed out that the wording emphasized the purpose of the article, which was to establish that every right carried with it certain obligations.

23. A drafting sub-committee appointed by the Chairman of the Commission produced the following text for paragraph 1 of the article:

> 1. Everyone has duties to the community which enables him freely to develop his personality.[14]

24. The Commission adopted this text.

25. A statement by a delegation concerning the results of the Commission's work was appended to the draft declaration. According to the statement, one negative aspect of the draft was its failure to include any concrete obligations whatsoever on the part of the individual towards his native land, the people to which he belonged and the State.[15]

3. THIRD COMMITTEE OF THE GENERAL ASSEMBLY

26. The draft international declaration of human rights was considered by the Third Committee of the General Assembly at the first part of the third session.

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[3] Report of the Drafting Committee of an International Bill of Human Rights to the Commission on Human Rights (E/CN.4/21), annex H, p. 94.

[4] *Ibid.*, annex E, p. 69.

[5] *Ibid.*, annex A, p. 9.

[6] *Ibid.*, annex D, p. 51.

[7] *Ibid.*, annex F, p. 73.

[8] *Official Records of the Economic and Social Council, Sixth Session, Supplement No. 1* (E/600), annex A, p. 15.

[9] E/CN.4/SR.34, pp. 6–8.

[10] E/CN.4/82/Add.8, p. 2.

[11] E/CN.4/82/Add.12, p. 24.

[12] E/CN.4/SR.50, p. 16.

[13] E/CN.4/SR.51, p. 6.

[14] E/CN.4/111, p. 1.

[15] Report of the Commission on Human Rights on its third session (Lake Success, New York, 24 May–18 June 1948) (*Official Records of the Economic and Social Council, Seventh Session, Supplement No. 2* (E/800)), appendix, p. 31, subparagraph (*e*).

27. Paragraph 1 of article 27 of this draft read as follows:

> 1. Everyone has duties to the community which enables him freely to develop his personality.[16]

28. While most representatives agreed with the ideas contained in the above-cited text, many disagreed with the wording. Thus, the debate in the Third Committee concentrated mainly on the various amendments submitted. The following general comments and amendments were made regarding the individual's duties to the community.[17]

(a) *General comments*

29. It was emphasized that it was not possible to draw up a declaration of rights without proclaiming the duties implicit in the concept of freedom which made it possible to set up a peaceful and democratic society. Without such a provision, all freedom might lead to anarchy and tyranny. Hence the great importance of article 27.

30. It was impossible for the individual to be free of society, for man was a social being. The most important task, therefore, in promoting human progress, was to find the proper balance between the interests of the individual and the interests of society and between individual and collective rights. Individual liberty had therefore to be balanced with the liberty of other individuals and with the reasonable demands of the community.

31. It was said that the purpose of paragraph 1 of the article was to make plain the interdependence of the rights and duties which linked an individual with the community. In choosing the word "community", the intention had been to point out, quite rightly, that the State was not the only social group concerned. If an individual had natural and inalienable rights transcending any specific legislation, he also had duties towards the community, independent of the characteristics of any given community. It was further thought that the text of article 27 as adopted did not contain the essential indication that the possession of each right implied a corresponding duty; as it stood, the declaration placed undue emphasis on individualism.

32. After the adoption of the article two different interpretations of paragraph 1 were given, which the delegations in question asked to be recorded; according to one interpretation, society established the environment which permitted the individual to develop his personality; according to another, an individual had no duties towards a society which did not ensure his free development.

(b) *Amendments*

33. It was proposed that the following text should be added to article 27, with the object of developing the concept of the duties of the individual:

> Respect for the rights of all requires that each shall do his duty. In all human activity, both social and political, rights and duties are indissolubly linked with one another. While rights enhance individual freedom, duties express the dignity of that freedom.
>
> Duties of a legal nature presuppose other duties of a moral nature which facilitate their understanding and serve as their foundation.
>
> It is man's duty to practise, uphold and promote culture by all means at his disposal, for culture is the highest social and historical expression of the human spirit.
>
> Morality being the noblest product of culture, it is the duty of all to respect it at all times.[18]

34. The author of the amendment explained that its purpose was to emphasize the relationship between rights and duties. He thought that, as it stood, paragraph 1 of article 27 tended to give too much importance to the individualistic side of man's character. If it was especially important to defend the individual against the State, it should also be clearly recognized that he was a member of society and that he must affirm his right as a human being to carry out the duties which were corollaries of his rights.

35. The proposal was criticized as being a statement of principles rather than the assertion of a right. The ideas which it contained were deemed controversial. By its form and length the text would not correspond to the purposes of the declaration and would not fit into its general structure.

36. The amendment was withdrawn after the rejection, in the process of voting, of its first and second sentences.

37. Another proposal,[19] subsequently withdrawn, was that paragraph 1 of the article should be deleted on the grounds that its deletion would make the escape clause afforded by article 27 as narrow as possible and would thus give more meaning to the statement of rights and freedoms.

38. The deletion of paragraph 1 of the article was generally opposed because it was felt essential for the declaration to recognize somewhere that the individual had duties to the community.

39. The following text was submitted to replace paragraph 1 of article 27:

> Everyone who has the right freely to develop his personality has duties to the community.[20]

40. The proposer of the text said that it was a rewording of the paragraph, which he considered to be too concise, but was not intended to call in question the close relationship between rights and duties.

41. The amendment was opposed on the grounds that the wording it proposed for paragraph 1 could easily be interpreted to mean that anyone who felt that he had not been allowed freely to develop his personality had no duties toward the community.

42. The author of the amendment accepted an oral proposal to draft paragraph 1 in the plural ("All men . . . have duties . . . ."). In explaining this proposal, its mover stated that such a formulation would imply that a majority which had been oppressed by the community had the right to revolt against it, but not that every individual had the right to do so on his own. The amendment, thus modified, was later withdrawn.

43. An oral amendment was submitted whereby the phrase "in which alone the free and full development of

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[16] *Ibid.*, annex A, p. 11.

[17] All the amendments to article 27 are reproduced in document A/C.3/304/Rev.2 (*Official Records of the General Assembly, Third Session, Part I, Third Committee, Annexes*, pp. 42–44).

[18] A/C.3/261.

[19] A/C.3/267.

[20] A/C.3/345.

his personality is possible" would be substituted for the phrase "which enables him freely to develop his personality".

44. The adoption of this amendment was opposed on the ground that it contained an inaccurate statement, for while there was no doubt that society contributed to the development of the individual's personality, it was no less true that such development was also conditioned by other factors.

45. In order to make the amendment generally acceptable, the suggestion was made to delete the word "alone" and to use the formulation: "which makes possible the full development of his personality", in order to avoid the assertion that the individual could only develop his personality within the framework of society. It was said that one had only to think of Robinson Crusoe to find proof of the contrary. On the other hand, article 27 should not be so worded as to give the impression that it was the duty of society to develop the human being's personality, a philosophy that was not shared by all countries. In that connection it was recalled that the members of the Committee had always taken care that the text they adopted should not impose the particular views of one country or group of countries on any other country.

46. The author of the oral amendment did not insist on his proposal, but the same amendment was taken up in the name of another delegation, which expressed the opinion that it stressed the harmonious relationship that should exist between the individual and the society in which he lived, since an individual could not fully develop his personality outside society. The example of Robinson Crusoe had shown, on the contrary, that man could not live without the aid of the products ot human industry and culture—in this case, the tools and books Robinson had found on his wreck. The amendment was adopted by 35 votes to none, with 6 abstentions.

47. As a result of the adoption of this amendment, paragraph 1 of article 29[21] of the Universal Declaration of Human Rights now reads as follows:

> Everyone has duties to the community in which alone the free and full development of his personality is possible.

B. Preparatory work relating to the fifth preambular paragraph of the International Covenants on Human Rights

48. After adopting the Universal Declaration of Human Rights, the General Assembly, on 10 December 1948, adopted[22] resolution 217 E (III), which read as follows:

> *The General Assembly,*
>
> *Considering* that the plan of work of the Commission on Human Rights provides for an International Bill of Human Rights, to include a Declaration, a Covenant on Human Rights and measures of implementation,
>
> *Requests* the Economic and Social Council to ask the Commission on Human Rights to continue to give priority in its work to the preparation of a draft Covenant on Human Rights and draft measures of implementation.

49. During its eighth session, the Economic and Social Council, by resolution 191 (VIII), of 9 February 1949, transmitted the aforementioned resolution to the Commission on Human Rights for action.

1. Fifth session of the Commission on Human Rights

50. During the Commission's fifth session (9 May–20 June 1949) it was able to prepare a draft covenant on human rights taking as a basis for its discussion the text drawn up by its Drafting Committee in May 1948.[23]

51. This draft covenant was intended to become an international convention or treaty providing for the practical realization of certain of the principles already proclaimed in the Universal Declaration of Human Rights. The substantive part of the draft covenant, as prepared at the Commission's fifth session, was in effect, an international code of human rights. It stated in clear, precise language—some of it drawn directly from the Declaration—the human rights and fundamental freedoms which, in the opinion of the Commission, should become the common concern of all the States parties to the covenant.

52. Each State, under the covenant as drafted by the Commission, would undertake to ensure to all individuals within its jurisdiction certain human rights and fundamental freedoms.

53. The Commission's work at that session, in particular with regard to the preamble of the covenant, was based upon the report of the Drafting Committee on an International Bill of Human Rights, which stated the following:

> The Preamble shall refer to the four freedoms and to the provisions of the Charter relating to human rights and shall enunciate the following principles:
>
> (1) that there can be no peace unless human rights and freedoms are respected;
>
> (2) that man does not have rights only; he owes duties to the society of which he forms part;
>
> (3) that man is a citizen both of his State and of the world;
>
> (4) that there can be no human freedom or dignity unless war and the threat of war is abolished.[24]

2. Sixth session of the Commission on Human Rights

54. During its sixth session the Commission on Human Rights had a general discussion of the preamble of the draft international covenant on human rights.[25]

55. It was emphasized that the preamble should state the principles on which the whole covenant was based, and should indicate very briefly what would be stated more concretely and in more detail in subsequent articles. The purpose which it was hoped to achieve by drafting the covenant must be defined together with the principles which would serve as a guide when the various human rights were set out in detail.

56. One speaker stated that the covenant formed a corollary to two important international instruments,[26] the Charter of the United Nations and the Universal Declaration of Human Rights. Article 55 of the Charter laid down that the United Nations "shall promote . . . universal respect for, and observance of, human rights

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[21] Before the adoption of the draft declaration by the Third Committee, article 27 was renumbered and became article 29.

[22] Resolution 217 E (III) was adopted by 44 votes to none, with 8 abstentions.

[23] E/CN.4/21, pp. 8 ff.

[24] *Ibid.*, p. 9.

[25] E/CN.4/SR.137, paras. 9–60.

[26] *Ibid.*, para. 17.

and fundamental freedoms for all . . .", while, in Article 56, "All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55". Lastly, Article 4 of the Charter laid down as a condition for the admission of new members to the United Nations that candidates should declare their willingness to accept the obligations contained in the Charter. The undertaking imposed on Member States by Article 56 of the Charter was one from which there was no withdrawing; it meant that Member States were under a strict obligation to apply the human rights provisions of the Charter. For its part, the Universal Declaration of Human Rights stated in the greatest detail what Member States meant by "human rights". That Declaration was a statement of the noble strivings of humanity which had seen the light of day after years of struggle. The covenant constituted an integral part of the general entity formed by the Charter, the Declaration and the covenant. It was the culmination of everything that had hitherto been done in the field of human rights.

57. Another delegation considered it important to state that the preamble should explain the purpose and scope of the covenant. The object of the covenant was to give legal expression to the obligations contained in the Charter which involved human rights. That was what had to be affirmed in the preamble and borne in mind in studying the various provisions of the covenant, if those provisions were to be drafted in a form likely to facilitate their application in all countries.

58. The preamble should emphasize the fact that the covenant was based upon both the United Nations Charter and the Universal Declaration of Human Rights. The covenant would be the smallest common denominator of those legal provisions upon which States, at their current stage of development, could reach agreement.

59. Further, the preamble should bring out the definite link between the Declaration and the covenant.

3. EIGHTH SESSION OF THE COMMISSION ON HUMAN RIGHTS

60. At the eighth session, the delegations of Australia and Sweden submitted the following important amendment[27] to the draft preamble proposed by the United States of America[28] for the international covenant on economic, social and cultural rights:

> After the fourth paragraph of the preamble, insert the following paragraph:
>
> *Realizing also* that the individual, having duties to other individuals and to the community to which he belongs, is under responsibility to strive for the promotion and observance of the rights recognized in this Covenant.

61. The mover of this amendment stated, *inter alia*, that paragraph 1 of article 29 of the Universal Declaration of Human Rights recognized the individual's duties to the community. The draft covenant before the Commission was concerned with the obligations of States; however, as States were the sum of individuals, the latter must co-operate if the covenant was to be implemented. The Australian-Swedish amendment brought that point out very clearly.[29]

62. After a brief discussion, the Chairman put to the vote a joint Chilean-Yugoslav amendment[30] to the draft preamble proposed by the United States together with the addition proposed in the joint Australian-Swedish amendment, which had been accepted by the sponsors of the Chilean-Yugoslav amendment. The amendment was adopted unanimously.[31]

63. Thus, the final text of the paragraph that was to become the fifth preambular paragraph of the two International Covenants read as follows:

> *Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

C. Comments by Governments relating to the individual's duties to the community

64. The Secretary-General, on behalf of the Special Rapporteur, transmitted to Governments a questionnaire in connection with the present study. The following information relating to the duties of the individual to the community is extracted from the replies of Governments:[32,33]

AUSTRIA

[*2 April 1976*]

(1) The Austrian Constitution does not set fundamental rights against "basic duties", but this does not mean that Austrian legislation does not impose duties on citizens (e.g., compulsory military service).

(2) An individual is subject to duties under international law only if he can be held directly responsible by virtue of the law of nations, rather than indirectly responsible in accordance with national rules of implementation, it being understood that the extent of punishment can be left to national regulation. But such direct responsibility of the individual under general international law applies exclusively to war criminals since, in accordance with traditional international practice, States have a right to punish prisoners of war who fall into their hands only if they committed acts in contravention of the law of war prior to being taken prisoner.

BARBADOS

[*31 October 1975*]

The duties of the individual to the community are not codified as such. The Constitution of Barbados recognizes and confers on the individual certain rights and privileges as well as corresponding duties and obligations to his fellow-men which are accordingly expected of him.

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[27] E/CN.4/L.171.

[28] E/CN.4/L.54/Rev.1.

[29] E/CN.4/SR.308, p. 13.

[30] E/CN.4/L.167.

[31] E/CN.4/SR.308, p. 14.

[32] Among the replies received were those of the Governments of Iran (19 January 1976) and Portugal (1 January 1976). However, since the respective constitutions on which the above-mentioned replies were based have been superseded by fundamentally different texts, the Special Rapporteur considered that it would not be useful to include those replies in the present study. The provisions relating to the individual's duties to the community contained in the Constitution of the Portuguese Republic adopted by the Constituent Assembly on 2 April 1976, which entered into force on 25 April 1976, are discussed below, in paragraphs 88 and 89.

[33] The dates of the replies from Governments are shown in parentheses after the names of the countries, which are listed in alphabetical order.

BOLIVIA

[*27 October 1975*]

(1) Bolivia, an independent, sovereign and free republic, has chosen a democratic and representative form of government. Thus, in accordance with the political constitution of the State, and its laws, decrees and other legal provisions, the legal system does not recognize any kind of servitude, and no person is obliged to render personal services without just reward and without his full consent. The legal system also recognizes every human being's personality, rights, freedoms and guarantees, and specifies his duties.

(2) Consequently, the intrinsic rights and duties of every person are those which the Constitution recognizes for the individual in his capacity as a free member of society, subject only to the limitations imposed by public order and the general welfare, according to the law.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC[34]

[*28 April 1976*]

(1) The rights and duties of citizens of the Byelorussian Soviet Socialist Republic, which are enshrined in the Constitution of the Republic, serve as the legal framework expressing the bilateral nature of juridical links between the socialist State and its citizens. In fact the basic rights and duties of citizens set out in the Constitution of the Byelorussian SSR constitute a list of the mutual rights and duties of citizens and of the State. Unilateral citizens' rights without corresponding duties of the State would be declarations without binding force, while citizens' duties unaccompanied by the right of the State to require their fulfilment would be wishful thinking.

(2) The socialist society and the State, while granting broad rights and freedoms to the individual, nevertheless make a number of demands on citizens, which are expressed in their duties. Social responsibility is regarded as one of the main requirements of the socialist way of life.

(3) In a socialist society, the obligations of citizens are not exhaustively set out in the form of legal requirements relating to civil, labour, administrative and other forms of responsibility. The concept of moral responsibility also exists. It implies the fulfilment by a person of socialist moral standards and principles and the reaction of public opinion if these norms and principles are violated, and the necessity of assuming personal responsibility for one's actions and their consequences. At the same time, neither legal nor moral standards can regulate all aspects of a person's conduct in society, nor can they fully determine his attitude to his obligations; hence the need to invest the concept of "responsibility" with a broader meaning unrelated to the system of penalties. This responsibility is called social responsibility, and its importance is growing. This trend is mainly a reflection of the tasks entailed by, and the features of, the present stage achieved in the development of socialist society, which makes new and greater demands on the individual, demands which affect all aspects of the individual's activity, his general and special education and his labour and socio-political activities.

ECUADOR

[*28 August 1975*]

(1) There is no special section in Ecuador's Constitution that is devoted to the individual's duties to the community. But since title XIII thereof lays down the fundamental guarantees which the State has a duty to provide, mention may be made *contrario sensu* of the individual's duties vis-à-vis the State, considered as the supreme expression of "the community".

(2) First of all, it is necessary to define the two basic terms "duty" and "community". "Duty" means that which man feels obliged to do because of the dictates of his conscience or of moral or positive injunctions. In the case in question, the individual's "duties" to the community are the object not only of positive injunctions but also of the injunctions of man's civilized conscience.

(3) The "community" is a society formed by individuals which enables its members, through their quest for the common good, to attain complete fulfilment as persons. The State is considered to embody the community, since it is engaged in the continuous quest for forms which will enable it to "personalize" man. A man fulfils himself as a person only through his fellow men.

(4) From the definition of the term "community" given above, it may be inferred that every individual has the right to fulfil himself as a person. If we accept that man fulfils himself as a person only through his fellow men, we must also accept that man has the right freely to fulfil his duty to mankind and to society.

(5) It must be stated that one of the individual's essential duties to the community is considered to be his effort to defend and increase the essential rights of the human person. Freedom, understood as man's basic right, from which all the other rights set out in various international instruments flow, is a benefit which is won day by day and its defence must embrace practically all human activity.

(6) Bearing in mind the foregoing fundamental premises, we shall briefly review the duties of the individual which follow from the rights guaranteed by the constitution and the laws—duties which are identical with those embodied in the American Declaration of the Rights and Duties of Man:

(*a*) The duty so to conduct himself in relation to others that each and every one may fully form and develop his personality;

(*b*) The duty to aid, educate and protect his minor children, and the duty to support and protect his parents when they need such assistance;

(*c*) The duty to acquire at least an elementary education;

(*d*) The duty to participate in national civic activities (in particular, to vote in elections);

(*e*) The duty to obey the law;

(*f*) The duty to render whatever civil and military service his country may require;

(*g*) The duty to co-operate with the State with respect to social security and welfare;

(*h*) The duty to pay taxes;

(*i*) The duty to work in accordance with his capacity and possibilities.

GERMAN DEMOCRATIC REPUBLIC

[*13 October 1976*]

(1) The concept of citizens' basic rights in the German Democratic Republic and the way in which those rights are put into effect are determined by the desire of the socialist State and socialist order to give individuals full scope to develop into socialist personalities, it being understood in this context that citizens' basic rights are inseparably linked with their basic duties to the community. The basic rights and duties of citizens of the German Democratic Republic are defined in a separate chapter of the country's Constitution (arts. 19–40). In laying down constitutional provisions governing citizens' basic rights in socialist society, the working class and its allies have in binding form codified the basic relationship between the State and its citizens and between the community and its individual members under socialist conditions. These provisions involve the right and the duty of every citizen, in the exercise of the people's democratic right to self-determination, to help actively shape the socialist social and State order, enabling him to develop his personality unhindered and to the full extent, in keeping with the laws of social development. The basic rights and duties of citizens and their active and responsible democratic status in society not only imply a strong moral obligation for each of them, but also ensure that their personalities and rights are protected by the State. In a socialist society, the constitutional embodiment of the basic rights and duties of citizens and of their legal status is based on the unity of rights and duties, which is inherent in the nature of socialist society and its State and rooted in the widest possible harmony between the personal concerns of the individual and the needs and tasks facing the community. For the sake of its development as a whole and of that of each of its members, socialist society is deeply concerned that all citizens make active use of their basic rights. The Constitution therefore makes it incumbent upon society and the State to postulate fulfilment of certain indispensable basic duties by citizens, so that they may be able effectively to enjoy their basic rights. In keeping with this principle, the Constitution of the German Democratic Republic sets forth the following basic duties of citizens: protection of peace and the socialist homeland, including defence of the German Democratic Republic (art. 23); performance of socially useful activity

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[34] A new Constitution (Fundamental Law) of the Byelorussian Soviet Socialist Republic was adopted in 1978. See also paragraph 95 below, in reference to the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics adopted on 7 October 1977, chapter 7 of which is entitled "The basic rights, freedoms and duties of citizens of the USSR".

(art. 24); compulsory schooling and vocational training for children and adolescents (arts. 25 and 26); protection and safeguarding of socialist property (art. 10); and the duty of parents to educate their children (art. 38).

(2) Thus, it is obvious that the basic rights of citizens in socialist society include a duty to exercise those rights, since this provides a positive guarantee of their effectiveness and full development.

(3) The coupling of citizens' basic rights and basic duties, as embodied in the Constitution of the German Democratic Republic, stems from an awareness that the enjoyment of the former and the discharge of the latter constitute an organic whole. When citizens exercise their basic rights and discharge their basic duties, they stimulate the successful development of socialist society. The unity of basic rights and basic duties and the fundamental harmony between personal interests and social needs are the underlying elements of a process in which the exercise of basic rights and the fulfilment of basic duties by citizens are increasingly becoming consciously respected common rules of individual and collective behaviour.

(4) The safeguarding of citizens' basic rights ensures the protection of personal freedom, yet more is involved than the mere protection of individual freedom; rather each is expected to assume his share of responsibility for the whole, and for further development of society through conscious, active and creative endeavour.

(5) The basic rights and duties laid down in the Constitution are fundamental to the content of the country's entire legal system and legislation; in fact, the laws serve to provide them with concrete substance. Cases in point are such major pieces of legislation as the labour, civil, family and penal codes, the patent and copyright laws, the court constitution act and the code of criminal procedure. The role of the legal system as regards the safeguarding, protection and enforcement of basic rights and duties of citizens is emphasized by the new party programme adopted at the Ninth Congress of the Socialist Unity Party of Germany:

> "The social effectiveness of our law is to be raised in order to enhance socialist modes of behaviour and socialist human relations and to guarantee that citizens can avail themselves of their rights and live up to their duties. Any violations of the socialist order, its constitutional foundations, public property, the life and health of citizens are consistently prosecuted on the basis of the appropriate laws."

(6) Closely related, therefore, to the safeguarding of citizens' basic rights and basic duties is the principle of general enforcement of socialist legality by the State and of its strict observance of the law. In implementing the principle of socialist legality, which is binding on and indispensable for all State agencies, all organizations and institutions as well as all citizens, the jurisdiction of the courts plays a particular role.

(7) The extent to which basic rights and duties of citizens are embodied in the Constitution of the German Democratic Republic and provided with concrete substance in the form of laws and other legal regulations is fully consonant with the Charter of the United Nations and with the Universal Declaration of Human Rights and the Covenants; indeed the Constitution goes even further in so far as additional basic rights have been granted to citizens of the German Democratic Republic.

GERMANY, FEDERAL REPUBLIC OF

[*3 June 1976*]

(1) In compliance with the Universal Declaration of Human Rights, the Federal Republic of Germany takes as its guide the ideal of free men and women who enjoy civil and political liberty and who live free from fear and want. Conditions have thus been created in this country in which everyone may genuinely preserve and enjoy his civil and political rights as well as economic, social and cultural rights.

(2) Human rights are conducive to individual self-fulfilment and self-determination. They protect the individual against any abuse of power by the State or social groups. By their nature, human rights are not tied to national frontiers. Internationally, they form the basis of freedom, justice and peace in the world. Human duties, on the other hand, do not have the exalted status of human rights. History shows that the community has usually succeeded by dint of its power and superior status in preserving its interests and inducing individual citizens to do their duty. On the other hand, it is much more difficult for an individual to defend himself against an abuse of power by the community or by those acting on its behalf and it is therefore necessary to give the individual special protection by granting him human rights. Independent organs, i.e. the courts, have to guarantee such protection. The state and the community, with their inherent monopoly of power, can protect themselves against dereliction of duty and abuses of the law by individual citizens. For this reason, the rights of the community vis-à-vis the individual and the individual's duties corresponding to these rights do not need to be protected and given institutionalized safeguards in the same way as human rights.

(3) The above description of the ideal of free and responsible people does not mean that the individual is completely unrestrained and devoid of any responsibility towards his fellow humans and the community. The concept of men and women in the German Basic Law is not that of an isolated, sovereign individual on the contrary. Pursuant to a ruling by the Federal Constitutional Court (Decision 4, 7 (15 *f*)), the Basic Law has decided on "the divergence between the individual and the community in favour of community reference and community dependence in respect of individual citizens without encroaching upon their intrinsic worth". A person's intrinsic worth is above all manifested in the sacrosanct dignity of men and women which presupposes room for the free development of their personality. Subject to this pre-condition, the questions may be answered as follows:

(4) The Basic Law (Constitution) of 23 May 1949, the Constitutions of the Federal Länder and the laws enacted by the Federal Republic and the Länder contain numerous duties incumbent upon the individual vis-à-vis the community. Unlike the Weimar Constitution of 1919, the Basic Law makes no reference to "fundamental duties". Whereas the Constitution of 1919 explicitly states that all citizens are required, pursuant to the laws, to render the State and the local authority personal service and to effect a contribution in relation to their means to all public burdens and charges, this is taken for granted in the Basic Law.

(5) A number of duties are however given particular emphasis in the Basic Law; these are, for example, the obligation incumbent upon appointed teachers loyally to observe the constitution (art.5, para. 3), the duty of parents to look after and educate their children (art. 6, para. 2), the obligation to perform compulsory military or substitute service (art. 12 *a*) and the obligation with regard to the use of property simultaneously to give consideration to the interests of the general public (art. 14, para. 2).

(6) Apart from constitutional law, the legislation of the Federal Republic of Germany also contains a large number of duties (particularly in the field of penal, civil and administrative law). In addition to the requirements in respect of taxes, imposts and services, there are also those pertaining to notification, information, identification and evidence, where non-compliance is a punishable offence. It is for instance a duty to notify the authorities of serious crimes (Penal Code, art.138) and to furnish assistance in cases of accidents and general danger or distress (Penal Code, art. 330c).

(7) The term "community" embraces not only the State and society but also other groupings such as the family to which an individual is linked by common ties of fate and fortune.

(8) The expression "the individual's right to fulfil in freedom his duty" used in the questionnaire is a formula which restricts the real meaning of human rights and is incompatible with the spirit of the United Nations Charter, the Universal Declaration of Human Rights and, above all, with the International Covenants on Human Rights of 1966.

(9) The duty to respect the rights and freedoms of other individuals and groups may lead to limitations on certain human rights. The idea that every human right is linked to a corresponding human duty is a fallacy. On the contrary, an individual's human rights are matched by the duty of the State and the community to respect and protect those human rights.

(10) The above-mentioned international instruments, or general international law, cannot be taken as establishing that the individual should resist demands and obligations vis-à-vis the community which are incompatible with the United Nations Charter, the International Covenants on Human Rights and other international conventions and declarations on human rights.

(11) Nor does the Federal Republic of Germany's Basic Law stipulate any general duty to resist. There is however a duty in German law for the holders of public office to resist orders which are manifestly conducive to the commission of a culpable offence or which offend human dignity (Federal Civil Servants Law, art. 56, para. 2; Law on Courts Martial, art. 5, para. 1).

(12) The Basic Law also establishes a right to resist anyone who undertakes to eliminate the constitutional order, if no other remedy

is possible (art. 20, para. 4). The constitutional order of the Federal Republic of Germany also includes fundamental and human rights.

(13) The dangerous and erroneous impression should be avoided that every human right is linked to human duties, the performance of which is an essential pre-condition for the granting of the right.

(14) Hitherto, the only reference in international law to direct obligations incumbent upon individuals has been that in respect of their duty to refrain from committing serious misdemeanours. There are, for example, certain situations in international customary law which also relate to individual citizens, such as the prohibition of slavery, piracy, crimes against humanity and particularly grave war crimes. It is possible that a prohibition of specific terrorist acts applicable to individuals is also in the process of development. On the whole, however, there have been only a few exceptional cases in international law.

GHANA

[*30 September 1975*]

(1) In Ghana, section 64 of the Labour Decree 1967 (NLCD 157) provides that the individual is obliged to render service in cases of emergency or calamity or in any circumstances likely to endanger the existence or well-being of the whole or part of the population. The individual may also be called upon to render minor communal services of a kind which are to be performed by the members of a community in the direct interest of the community. Any individual who refuses without reasonable cause to render such service is guilty of an offence and shall be liable, on summary conviction, to a fine of four cedis.

(2) The term "duty" may connote a legal or moral obligation, depending on the context in which it is used. Thus, for example, in Ghana a man is under a legal duty to maintain his wife and children. In addition to this legal duty, a man is morally obliged to maintain his nephews and nieces because of the nature of the family system. This family system is such that a man's obligations extend beyond the narrow confines of his wife and children to the members of his extended family. The extent of a man's family in Ghana depends on whether he belongs to the matrilineal or patrilineal system of inheritance.

(3) "Community" is a nebulous term difficult to define with precision. In Ghana it may apply to all the subjects of a traditional state, e.g. the Ashanti State; or it may apply to the divisions of a state and also to the towns and villages of the divisions of a state. The word "community" is also used to distinguish the two main systems of inheritance in Ghana that is, the patrilineal communities (where inheritance is through the male line) and matrilineal communities (where inheritance is through the female line).

GREECE

[*4 May 1976*]

(1) The Constitution of Greece, which was voted by the fifth Revisionary Parliament of the Hellenes on 9 June 1975 and entered into force on 11 June 1975, embodies a number of fundamental provisions safeguarding human rights and fundamental freedoms, and also deals with the question of the individual's obligations to the State and his obligation to observe the Constitution.

(2) In accordance with article 28, paragraph 1, of the Constitution, "The generally recognized rules of international law, as well as international conventions as of the time they are ratified by law and become operative according to the conditions therein, shall be an integral part of domestic law and shall prevail over any contrary provision of the law." On this legal basis the Greek courts, and in particular the Council of State (Conseil d'Etat), have pronounced a number of judgements relating to the individual's duties to the community and based on the Constitution of Greece and many other international instruments, e.g. the International Conventions of the ILO.

(3) In all human activity, both social and political rights and duties are indissolubly linked; while rights enhance individual freedom, duties express the dignity of that freedom. An individual has a duty towards his neighbours, his family, his group, his nation, to society, to the international community and to all mankind.

(4) For the purpose of this study the term "community" should be deemed to include the family, other social groups, society, the State, the international community and mankind.

(5) It should be noted that in accordance with article 21 of the Constitution of Greece the family as the foundation of the preservation and the advancement of the nation is under the protection of the State.

(6) Article 29, paragraph 1, of the Universal Declaration of Human Rights lays down a general rule for individual behaviour in the community to which the individual belongs. It is only within the community that the free and full development of the personality of the individual is possible.

(7) According to article 28, paragraph 1, of the Constitution of Greece, "The generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein, shall be an integral part of Greek domestic law and shall prevail over any contrary provision of the law". This is the case with, for example, the Charter of the United Nations, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the League of Nations Slavery Convention of 1926, amended by the Protocol of 1953, the Convention Relating to the Status of Stateless Persons, etc., which already constituted an integral part of Greek domestic law. Thus, it could be argued that, in accordance with article 120, paragraph 4, of the Constitution of Greece, the Greeks have the right and the duty to resist by all possible means any person who attempts to abolish the Constitution by violence.

(8) The position of individuals as subjects of international duties is of great importance. In the first place, the proposition that individuals can be subjects of international rights necessarily involves the corollary that they can be subjects of international duties; the cogency of the claim to the former gains by the admission of the latter. Secondly, to assert that duties prescribed by international law are binding upon the impersonal entity of States as distinguished from the individuals who compose them and act on their behalf is to open the door wide for the acceptance, in relation to States, of standards of morality different from those applying among individuals. The term "different standards" means, in this connection, standards which are lower and less exacting. Thirdly, it is difficult to escape the conclusion that unless legal duties are accepted as resting upon the individual, they do not in practice—nor, to some extent, in law—obligate anyone. These apparently theoretical considerations received illuminating comment in the judgement given on 30 September 1946 by the Nuremberg International Military Tribunal, which said:

> "It was submitted that international law is concerned with the actions of sovereign states and provides no punishment for individuals . . . these submissions must be rejected. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (Transcript of Proceedings, p. 16,878.)

This is the correct meaning of article 6 of the Charter of the Nuremberg International Military Tribunal which stipulates that there shall be individual responsibility of the defendants for the acts within the jurisdiction of the Tribunal.

HUNGARY

[*21 July 1976*]

(1) In the Hungarian People's Republic all power belongs to the working people (Constitution, art. 2, para. 2). The working people exercise their power through elected organs of popular representation (councils, the National Assembly) in conformity with the common interests of citizens, in representation of the community.

(2) The state in a socialist society protects the rights of citizens. In recognition of the common interest, compliance by the individual with his duties to society receives, at the same time, legal expression in the Constitution of the Hungarian People's Republic as well as legal guarantees in the laws enacted in accordance therewith.

(3) Act 1 of 1972 (art. 54, para. 1) "on the Amendment of Act XX of 1949 and of the Integrated Text of the Constitution of the Hungarian People's Republic" emphasizes that "Human rights shall be respected in the Hungarian People's Republic". It further provides (art. 54, para. 2) that in the Hungarian People's Republic the rights of citizens shall be exercised in keeping with the interests of socialist society, whereas the exercise of rights is inseparable from the

fulfilment of duties. Respect for human rights in the Hungarian People's Republic is imbued with this spirit.

(4) The constitutional rights of citizens provide, in keeping with human rights, a legal basis for citizens' compliance with their constitutional duties individually or collectively. Article 68 of the Constitution further provides that participation in public affairs (public service) is at the same time a constitutional right and a fundamental duty.

(5) As regards judicial practice in the Hungarian People's Republic, the individual's duties to the community are primarily determined by the principles of the Constitution and by the laws and regulations giving effect thereto. These duties are generally enforced through administrative proceedings.

(6) The citizens of the Hungarian People's Republic, legally exercising their fundamental rights and performing their duties as laid down in the Constitution, fulfil in freedom their duties to man and to the community both individually and collectively.

(7) Accordingly, the free exercise of the constitutional right to work, for instance, is enhanced by the legal enforcement of a planned manpower policy based on the national economic plan, as provided for in article 55, paragraph 2, of the Constitution.

(8) The duty of the individual to respect the rights and freedoms of other individuals emanates from the legal guarantees for, and the practical implementation of, the basic constitutional principles discussed in the preceding sections.

(9) Individuals may be held responsible for the commission of crimes against the law of nations. Such offences are determined by the internal legal order of the Hungarian People's Republic in pursuance of the relevant international conventions.

(10) Chapter X (arts. 135—141) of the Criminal Code, promulgated by Act V of 1961, covers the crimes against peace and humanity (instigation to war, crimes against the freedom of the peoples, genocide, crimes against a group or a nation, people, race or religion, cruelty in times of war, destruction in times of war, and abuse of the Red Cross).

(11) Within the scope of individual and social duties to respect the rights and freedoms of others, the Constitution of the Hungarian People's Republic provides that women enjoy equal rights with men (art. 62, para. 1).

IRAQ

[*24 December 1975*]

(1) It is to be noted that the Universal Declaration enumerates many human rights, while finding it sufficient to refer in article 29 to duties, without any identification of these duties or indication of the responsibility that arises from neglecting them. These duties therefore require further study and identification.

(2) While granting rights to individuals, Iraqi legislation imposes on them duties toward their society as required by social solidarity in order to live peacefully and securely in a civilized society.

(3) Article 10 of the Iraqi Provisional Constitution therefore provides that social solidarity is the primary foundation of society and that social solidarity means that each citizen shall carry out in full his duty towards society and that society shall ensure to the citizen his full freedoms and rights.

(4) Proceeding from these principles, article 30, paragraph (*a*), of the Provisional Constitution of Iraq states that public office is a sacred mission and a social service, and is based on a devoted and enlightened commitment to the interests, rights and freedoms of the masses, in accordance with the Constitution and the law.

(5) Article 31, paragraph (*a*), provides that defence of the country is a sacred duty and an honour, that military service is compulsory and that its performance is regulated by law.

(6) Article 32, paragraph (b) stipulates that work is an honour and a sacred duty of each citizen who can perform it and is made necessary by the need to contribute to the construction, protection, development and prosperity of society.

(7) Article 35 states that paying taxes is a duty of all citizens and that taxes are not to be imposed, modified or levied except by law.

(8) As to the concept of "duty" in this respect, it covers all that the citizen should do or refrain from doing within the context of social solidarity, which is the primary foundation of society. In return, society guarantees rights and protects freedoms for the citizen. The most essential duty of the individual is to respect the society in which he lives and to respect the rights and freedoms of others.

(9) The word "society" indicates a group of individuals, families and institutions which have their own territory and are bound together by social solidarity.

(10) The Iraqi Provisional Constitution provides that the family is the nucleus of society, and that the State shall ensure its protection for mothers and children.

(11) To sum up, the Provisional Constitution of Iraq provides for duties which bind the individual to society.

ISRAEL

[*5 November 1975*]

(1) The laws of the State of Israel and the regulations made thereunder do not generally impose on the individual positive duties towards the community. The "Draft Basic Law: Human Rights" does not even mention a general duty of loyalty and allegiance to the State. The Supreme Court has, however, expressed the view that "The status of Israeli nationality contains within itself the duty of allegiance to the State of Israel" (*Iredor* v. *Chairman of the Central Elections Committee* (1965), 19 P.D. (III) 386). And a person applying for naturalization must, before the grant is actually made, declare formally that he will be a loyal citizen.

(2) Where duties are expressly imposed, they are binding not only on citizens but also on persons permanently resident in Israel. This is true of the obligation to perform military service; the obligation to pay taxes, compulsory loans and other imposts levied under law; the obligation of parents and guardians to take care of the needs of their minor children, including their education (there also exists a separate obligation to register children and adolescents up to the age of 17 with the local education authority), and to manage and preserve their property; the obligation to maintain one's spouse and children under the age of 18, one's parents and the parents of one's spouse, one's grandchildren and other members of one's own or one's spouse's family.

(3) The duties specifically incumbent upon a person owing allegiance to the State are found in the Penal Law (State Security, Foreign Relations and Official Secrets Law, 1957), which deals with service or enlistment in enemy forces and the disclosure of official secrets. Obligations are imposed on everyone not to commit acts calculated to impair the sovereignty or territorial integrity of the State, not to bring about military action against Israel, not to spread defeatist propaganda at a time of hostilities and not to impair Israel's foreign relations; however, only Israeli citizens, permanent residents, or persons otherwise owing allegiance to the State of Israel are criminally responsible before the Israeli courts for such offences committed abroad.

(4) Apart from the foregoing, duties incumbent on individuals are implied or arise indirectly. Sometimes they constitute the counterpart of some benefit or advantage received. Thus, no one is compelled to work, but the benefit of employment insurance is denied those who, without good reason, refuse to accept employment offered to them. Duties are sometimes intended to serve the personal good of the individual as well as the general welfare—for example, the obligation of employers to contribute to social security or the obligatory third-party insurance imposed on car drivers. Mention should also be made of the obvious and negative obligation imposed on everyone not to commit offences under penal law or to contravene administrative or police regulations.

(5) It is impossible to provide exhaustive information as to the jurisprudence and practice of Israeli courts concerning the individual's duties to the community in so far as these are based on constitutional, legislative and regulatory provisions. As regards international instruments, it is hard to find a case directly based on these, since there almost always exist parallel provisions in Israeli municipal law, and judicial decisions are naturally based on such provisions, rather than on the international instruments which they reflect. Thus, in the celebrated Eichmann case ((1962), 16 P.D. 2033), Eichman was tried for offences under the Nazi and Nazi Collaborators (Punishment) Law of 1950, and not for offences under the Convention on the Prevention and Punishment of the Crime of Genocide, to which Israel is a party. In the same way, acts of aerial hijacking would be tried in Israel under Air Navigation (Offences and Jurisdiction) Law 1971, and not under the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963) or the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970), to both of which Israel is a party and which influenced the formulation of the Israeli law. The same applies to piracy, dangerous drugs, etc.

(6) Where no such parallel statute exists, the dictum of J. Cohn in *American-European Bethel Mission* v. *Minister of Social Welfare* ((1967), 21 P.D. (ii) 325, 333) will apply:

> ". . . the rules of international law constitute part of the law prevailing in this country in so far as they have been adopted by a majority of the nations of the world and are not inconsistent with the law enacted by the Knesset. . . . The fundamental doctrines of human rights as laid down by the Universal Declaration of Human Rights, 1948, and the Covenant on Civil and Political Rights, 1966, are today the patrimony of all enlightened peoples, . . . whether or not they have already ratified the Covenant of 1966."

JAPAN

[*17 February 1976*]

Constitutional provisions on duties of the individual to the community

(1) The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavour of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare (art. 12).

(2) No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited (art. 18).

(3) The infliction of torture by any public officer and cruel punishments are absolutely forbidden (art. 36).

Basic Law for Environmental Pollution Control (responsibility of citizens)

(4) Citizens shall endeavour to contribute to the prevention of environmental pollution in all appropriate ways, such as co-operating with the State and with local government bodies in the implementation of control measures (art. 6).

Nature Conservation Law (obligation of the people)

(5) The people shall endeavour properly to conserve the natural environment and to co-operate with the State and local public bodies in their implementation of the plans for conservation of the natural environment (art. 1).

Natural Parks Law (No. 161 of 1967), as amended, inter alia, by Law No. 85 of 1972

(6) Article 2-2 of the Natural Parks Law states that, in accordance with the basic intent of article 2 of the Nature Conservation Law (No. 85 of June 1972), the State, local public bodies, park workers and visitors to the natural parks shall all try to protect the natural scenic beauty and promote appropriate utilization.

(7) Under article 3 of the Natural Parks Law, proprietary rights, mining rights and other property rights shall be respected, and the adjustment between land development and other public interests shall also be taken into consideration.

The Fundamental Law of Education (compulsory education)

(8) Persons who exercise guardianship over children must ensure that the children receive nine years of general education (art. 4).

School Education Law

(9) Persons who employ children shall ensure that the employment does not prevent the said children from receiving compulsory education (art. 16).

(10) Persons who exercise parental authority over children or, in the case where there are no such persons, the guardians shall be obligated to send their children to an elementary school, or the elementary department of a school for the blind, a school for the deaf or a school for the handicapped, for the period from six years of age to twelve years of age. Should, however, the children be unable to finish the course before the end of the year in which they attain twelve years of age, the parents or guardians shall be obliged to send them to school until the end of the school year in which the children attain 15 years of age (art. 22, para. 1). Matters regarding the instigation to fulfil the obligation mentioned in the preceding paragraph and other necessary matters regarding the obligation shall be provided for by a Cabinet Order (art 22, para. 2).

(11) Parents or guardians must send their children to a lower secondary school, or the lower secondary department of a school for the blind, a school for the deaf or a school for the handicapped, for the period from the beginning of the school year after they finish elementary school to the end of the school year in which they attain 15 years of age (art. 39, para. 1). Children whom parents or guardians are obligated to send to school according to the provisions of the preceding paragraph shall be called school-age pupils (art. 39, para. 2). The provisions of article 22, paragraph 2, and article 23 shall apply *mutatis mutandis* to the obligation stipulated in paragraph 1 of article 39 (art. 39, para. 3).

LUXEMBOURG

[*8 April 1976*]

(1) There is no specific legislation in Luxembourg on the duties of the individual to the State. His many duties spring from the principle that "ignorance of the law is no excuse". The individual must observe the laws and regulations of the State and local communities. He must, on pain of punishment, refrain from acts contrary to public order; protection of goods and persons is assured by the penal code and its annexes.

(2) The tax laws of the country determine the individual's contribution to the taxes and charges levied by the central and local authorities.

(3) The contribution of the individual to sickness and invalidity insurance and to a pension scheme is regulated by social laws.

(4) Although compulsory military service was terminated by the Act of 29 June 1967, persons can be called upon in case of need under special acts (Act of 11 April 1796 authorizing the impressment of workers to give effect to the decisions; the Grand Ducal Order of 27 August 1939 authorizing the requisition of all immovables and the impressment of all persons for the purpose of ensuring the security of the State and of persons; and the Grand Ducal Order of 6 January 1945 concerning the administration of those parts of the country where the normal operation of the authorities had been impeded as a result of the state of war).

MAURITIUS

[*20 February 1976*]

The law of Mauritius does not impose on the individual any specific duties towards the community.

MOROCCO

[*12 July 1976*]

(1) Generally speaking, every right implies a duty, and it was therefore natural that, after proclaiming an impressive list of fundamental human rights, the Universal Declaration should establish a strict boundary in article 29 by reminding the individual: (*a*) that he has general duties to the community; (*b*) that he cannot exercise his rights to the detriment of those of others, or to the detriment of public order and the general welfare in a democratic society; (*c*) that he cannot exercise his rights contrary to the purposes and principles of the United Nations.

(2) Accordingly, although the Universal Declaration of Human Rights does not promote excessive individualism, it is nevertheless designed to protect the human person against the abuses of tyranny and against subjection to groups which invoke the general welfare only to serve their own purposes of domination. To this end, the Declaration has established personal rights (right to life, right to security of person, right to liberty); family rights; political rights and public freedoms; and social and economic rights.

(3) Before dealing with the required study in accordance with the proposed plan, it is relevant to point out that the Moroccan Constitution promulgated by Law No. 1.72.061 of 23 Moharrem 1392 (10 March 1972) declares in its preamble: "Being aware of the need to incorporate its actions into the framework of international organizations, of which it has become an active and dynamic member, the Kingdom of Morocco subscribes to the principles, rights and obligations arising from the charters of these organizations".

(4) Similarly, the Kingdom of Morocco reaffirms its determination to strive for the maintenance of peace and security in the world.

(5) In the context of this proclamation, the subsequent provisions of the Constitution and of Moroccan domestic legislation as a whole apply the rules set forth in the Universal Declaration and in the later International Covenants on Human Rights.

(6) With regard to the duties of the individual to the community (Universal Declaration, art. 29, para. 1), the first general duty imposed on everyone is formulated in article 4 of the Constitution,

which provides that: "The law is the supreme expression of the will of the nation. Everyone must obey the law. The law can have no retroactive effect."

(7) Accordingly, the obligation to abide by the law and by all regulations adopted by the public authorities in the collective interests of the nation extends to everyone who resides in the territory of the Kingdom, whether or not he is a citizen.

(8) Moreover article 6 of the Constitution lays down another duty of the individual to the community, that of respecting the religion of others. This clause provides that "Islam is the religion of the State, which guarantees freedom of worship to all", and it is supplemented by articles 220, 221 and 223 of the Penal Code, which prohibit interference with freedom of worship and the defacement of monuments or objects used for religious purposes.

(9) Another duty provided for in article 10, paragraph 2, of the Constitution is that of respect for the homes of others. The clause provides that "the home is inviolable" and this prohibition makes any individual who violates it liable to the penalties laid down in article 441 of the Penal Code.

(10) Furthermore, under article 11 of the Constitution, "correspondence shall be secret" and the opening of or tampering with correspondence by an individual is punishable under article 448 of the Penal Code.

(11) Article 15, paragraph 1, of the Constitution further proclaims that "The right to own property is guaranteed" and any damage done to the real property of another person is punishable under articles 570 and 606 of the Penal Code.

(12) Lastly, articles 16, 17 and 18 of the Constitution impose on everyone the duty of contributing to certain expenditures for the benefit of the community. These articles read as follows:

> "Article 16: All citizens shall contribute to the defence of the nation.
>
> "Article 17: Everyone shall contribute, according to his capacity, to public expenses, which can be established and allocated only by law, in accordance with the procedures provided for in the present Constitution.
>
> "Article 18: Everyone shall bear jointly the expenses resulting from national disasters."

(13) The meaning of the term "duty" should be defined as that which one must do, that which is imposed as a legal or moral obligation.

(14) The term "community" should be understood to mean the whole body of citizens, the people or the State.

(15) With regard to "the individual's duty to oppose the demands of the community which are incompatible with the purposes and principles of the United Nations Charter, the Universal Declaration and . . . [all the subsequent] international instruments relating to human rights", this question, which is based on conscientious objection in the widest sense of that term, does not concern Morocco, because its nationals are not confronted with this kind of problem, since none of its constitutional or legislative provisions run counter to the principles enshrined in the international instruments.

PAKISTAN

[*14 May 1976*]

(1) In Pakistan, the individual's duties to the community have not been laid down anywhere specifically in a codified form. To quote Gilchrist in his *Principles of Political Science*, individuals have "the duties of obedience, allegiance and support, both moral, such as by public service, and material, such as paying taxes", towards the State which represents the community.

(2) The following are the duties of the individual to the State; the first two have been recognized by the Constitution of the Islamic Republic of Pakistan and the others arise out of legislation, practice, or similar sources:

(a) *Allegiance to the State*. Every citizen owes allegiance and loyalty to the State. He has duty to defend the State in case of war and to render service and loyalty in the maintenance of its integrity. Maintenance of integrity implies that a citizen is under a duty to keep peace and order and not to indulge in violence, rebellion or insurrection.

(b) *Obedience to the laws*. It is the supreme duty of a citizen to abide faithfully by the Constitution and to obey the law. Good citizenship in fact consists in obedience to laws which are made for the benefit and welfare of the community. Obedience to the law is required not only from citizens, wherever they may be, but from every person who is temporarily in Pakistan. Obviously such obedience is necessary in the interest and welfare of the community. In one case the Supreme Court of Pakistan disapproved the abrogation of the Constitution by the Chief Martial Law Administrator.

(c) *Payment of taxes*. The State has to spend huge sums of money for the performance of its functions. It is the duty of every citizen to pay taxes, national and local, punctually and regularly. Taxes are compulsory contributions collected by the State to meet its expenses, and it is the legal duty of each citizen to pay them so that the State may continue to function. There are different laws dealing with the collection of taxes, the main one of which is the Income Tax Act of 1922.

(d) *Exercise of franchise and holding of offices*. As Pakistan is a democratic State, all adult citizens, subject to certain qualifications, have the right to vote, and they must exercise this right in electing their representatives. They must also offer themselves for election. Voting is a fundamental and essential part of a citizen's duty to the State. This duty of the citizen has been regulated by the Constitution, the Electoral Rolls Act of 1974 and the National and Provincial Assemblies (Election) Ordinance of 1970.

(e) *Duty to assist the Government in the maintenance of law and order*. Without law and order no society can make progress. It is one of the main functions of a State to maintain law and order. The law therefore imposes on the citizens an obligation to inform the authorities if an offence has been committed or is contemplated and to render all possible assistance in the detection of crimes. To ensure its safety the State may call upon citizens in times of emergency to render service and assist in the maintenance of peace and order.

(f) *Miscellaneous duties*. It is the duty of every citizen to render services to the State, when called upon to do so, as a member of public committees, organizations, local bodies, representative Assemblies, etc. The services of eminent citizens are requisitioned for this purpose by a variety of laws, rules and notifications.

(3) The meaning of the term "duty" has not been defined, although the term has been used in article 5 of the Constitution. Its meaning is to be ascertained in the light of the writings of the jurists, such as Salmond, Hughes and Dias, as we have no case of our courts dealing directly with this point. Human conduct is controlled by injunctions prescribing what individuals should do or refrain from doing. Duties are of different kinds—moral or legal, for example. When law recognizes a duty, it commonly enforces performance of it or punishes disregard of it. It must be noted that enforcement or sanction is generally a necessary ingredient, but not always essential. The duty to be enforced should be enforced not only by statute law but also by the general law of the land. The Constitution of Pakistan recognizes that the citizens have a duty towards the State and other members of the community. It consequently enforces a duty on them to exercise their rights, which have been guaranteed to them in the Constitution, in such a manner as not to destroy the rights of others.

(4) The meaning of the term "community" has not been defined in the Constitution or by any law of Pakistan either, but the term has been used in some articles of the Constitution relating to fundamental rights. For example, article 22 states that in respect of any religious institution, there shall be no discrimination against any community in granting tax exemptions or concessions; and in clause 3 of that article, the word "community" has been qualified by the word "religious". It has a different meaning according to where it is used, and generally means the public. A common Government is the basis of a community which is founded by any number of individuals.

(5) According to *Black's Law Dictionary*, "community" means "body of people living in the same place, under the same law and regulations, who have common rights, privileges or interest". Therefore "community" may sometimes mean the citizens of Pakistan as a whole and sometimes a distinct class of them, as observed by the High Court of Pakistan.

(6) Individuals in Pakistan have full freedom to fulfil their duty to man and to the community, in the sense that there is no law preventing them from fulfilling their obligations. However, an individual must perform his duty in such a manner as not to violate the rights and freedoms of other individuals or the community as a whole. An individual has two kinds of duties towards the community and other persons: moral and legal. Those moral duties which have been recognized by law become legal duties, and failure to perform them is punished. So far as moral duty, as recognized in the

community, is concerned, the individual is entirely free to perform it or not, and this aspect of human relations is regulated by social sanctions. For instance, if an individual neglects his moral duty to help the poor, needy or sick, there is no legal punishment. However, some moral duties relating to family, community and State have been recognized by law—for instance, an individual's duty to maintain his wife and children, not to kill other persons or damage or destroy their property and not to attempt to overthrow the State. These duties have been incorporated into law, violations of which are punished, and are set forth in the Penal Code of Pakistan.

(7) Individuals have a duty towards the international community not to commit any act which might destroy world peace, but this duty has not received any legal sanction in Pakistan, except that following Pakistan's accession to the Convention on the Prevention and Punishment of the Crime of Genocide, that crime is now legally recognized in Pakistan as an offence against the international community.

(8) An individual is free to oppose any demands of the community which are incompatible with the purposes and principles of the United Nations Charter and other international instruments. This duty can be fulfilled by him only by the formulation of strong public opinion which may deter the community from the act. The individual is not supposed to take any action for this purpose which is forbidden by law, but he can make propaganda and draw the attention of the community by peaceful means such as the press, meetings, etc.

(9) The state is expected to respect the international instruments to which it is a party. So far, under international law, the individual has not been considered as directly subject to international duties, but he is rather considered as being subject to the laws of the State, so that any wrong committed by him which is in the nature of an international wrong can be regulated only by municipal laws, and he can plead that he has not committed any offence under municipal law if the offence of which he is accused has not received recognition in municipal law. However, as was pointed out above, in one respect the Government of Pakistan has recognized that citizens of Pakistan are subject to international duty. Pakistan has acceded to the Convention on the Prevention and Punishment of the Crime of Genocide. If the army of Pakistan commits an act in contravention of the provisions of the Convention, the person responsible cannot plead that he has committed the offence under orders from his Government. Thus, his responsibility to observe the Convention is direct.

SENEGAL

[*28 April 1976*]

(1) Title II of the Constitution of the Republic of Senegal of 8 March 1963 concerns "Civil freedoms and freedoms of the human person" and confirms the devotion of the Senegalese people to fundamental rights, as defined in the Declaration of the Rights of Man and of the Citizen of 1789 and in the Universal Declaration of Human Rights of 10 December 1948. The necessary and obvious consequence of this recognition of the fundamental rights of the individual is that he is required to discharge a number of duties to the community, which take the form of legal obligations to perform or to refrain from certain actions.

(2) Article 15 of the Constitution of the Republic of Senegal states: "Parents have the natural right and the duty to bring up their children. They shall be supported in that task by the State and by the community."

(3) Certain duties are also set out in title I of the Penal Code, entitled "Crimes and offences against the State", which contains the following chapters: chapter I, "Crimes and offences against State security"; chapter III, "Crimes and offences against the Constitution"; chapter IV, "Crimes and offences against public order". The numerous provisions in these chapters are designed to establish the duty of the individual, subject to penalties, never to engage in treason or espionage; impair the national defence; commit outrages or conspire against the authority of the State or the integrity of Senegalese territory, or commit crimes liable to disrupt the State; be guilty of offences relating to the exercise of civic rights; or engage in attacks against freedom.

(4) These constitutional and legislative provisions show that the duties of a Senegalese to the national community are the guarantee of the exercise of his rights and the enjoyment of his freedoms.

(5) The following observations were made by the Government of Senegal on the meaning of the terms "duty" and "community".

(6) "Duty" as a legal obligation incumbent on the individual, which may require either an action or an abstention from action, is an obligation which usually derives from general principles of law (not to harm others, not to enrich oneself unjustifiably at their expense), or from laws in force, or from custom (criminal law, organization of the family under civil law). It may also be a moral obligation incumbent on an individual.

(7) A "community" is a group of individuals united by bonds of solidarity, having the same interests.

(8) As regards the individual's right to fulfil in freedom his duty to man and the community, it was observed that the rights and duties of man cannot be restricted, provided that the exercise of individual rights does not infringe the rights and duties of others.

(9) Nevertheless, it is an individual's duty to oppose any demands of the community which are incompatible with the purposes and principles of the Charter of the United Nations, the Universal Declaration and International Covenants on Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the United Nations Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination, the Declaration of the United Nations Conference on the Human Environment and other international instruments relating to human rights and freedoms.

(10) The concept of human rights has been put forward by writers, thinkers, philosophers and great figures in the world history since the dawn of civilization. It has never lost ground; on the contrary, it has now become the apanage of men and nations. The United Nations has forcefully reaffirmed its high value by inscribing civil, political, economic, social and cultural rights in the Universal Declaration of Human Rights, unanimously adopted by Member States. Respect for human rights has thus become a sacred duty, and all resistance to community demands which are incompatible with the purposes and principles of the Charter of the United Nations, the Universal Declaration and the International Covenants on Human Rights is perfectly legitimate. The duty to resist violations of human rights deserves to be encouraged and supported.

SOMALIA

[*29 January 1976*]

(1) In accordance with the procedures, laws and customs of the Somali Democratic Republic, all rights in the Universal Declaration and the International Covenants on Human Rights are to be enjoyed by all persons without discrimination as to race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) In accordance with the first Charter of the Supreme Revolutionary Council of 21 October 1969, based on the sacred right of the people and solemn understanding of the United Nations Charter and the Charter of the Organization of African Unity, the people of Somalia decided to create a society founded on the principle of popular sovereignty, equality and justice and for a better social life. The second Charter was issued by the Supreme Revolutionary Council on the basis of the first Charter and states, *inter alia*, that the Somali Democratic Republic protects the peaceful life of its citizens, strives for the systematic improvement of their standard of living, safeguards the unhindered development of the individual, and provides guarantees for the active exercise of fundamental rights and duties. This requires every citizen to share in the common responsibility.

SRI LANKA[35]

[*21 January 1976*]

(1) The Prevention of Social Disabilities Act, No. 21 of 1957, lays down certain duties of the individual to the community, and stipulates that any person who imposes a social disability on another person by reason of such other person's caste shall be guilty of an offence and shall, on conviction after summary trial before a magistrate, be liable to imprisonment for a term not exceeding six months or to a fine not exceeding 100 rupees.

(2) For the purpose of section 2 of the above-mentioned Act, a person shall be deemed to impose a social disability on another person:

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[35] For a summary of the relevant provisions of the new Constitution of Sri Lanka, which came into force in 1978, see part two, paragraphs 122–124.

(*a*) If he prevents or obstructs such other person from or in: (i) being admitted as a student to, or being employed as a teacher in, any educational institution; (ii) entering, or purchasing any article at, any shop, market or fair; (iii) entering, or being served at, any public hotel, rest-house, eating house, restaurant or any other place where articles of food or drink are sold to the public; (iv) obtaining any room for residence in a public hotel, rest-house, or lodging-house; (v) obtaining or using water from any public well, spring, water-pipe or any other source of supply of water to the public; (vi) entering, or obtaining the service provided at, a public hairdressing salon or laundry; (vii) entering any public cemetery and attending or taking part in any burial or cremation therein; (viii) wearing any kind of clothes, head-covering or foot-covering at any place to which the public has access whether on payment or otherwise, or at the place of such other person's employment, or in the course of such person's trade, business or employment; (ix) Being carried as a passenger in any public vehicle or vessel; (x) Entering, or being present in, any place to which the public has access whether on payment or otherwise, other than a temple, *devale*, *kovila*, church, mosque or other place of religious worship, or (ix) Being engaged in any lawful employment; or

(*b*) If he prevents or obstructs such other person, who is the follower of a particular religion, from entering, being present or worshipping at any place of worship to which followers of that religion have access; or

(*c*) If he, as a public officer, does not perform or exercise a duty or power which he is legally bound to perform or exercise for the benefit of such other person; or

(*d*) If he, as the proprietor of, or a person having control over, or a person employed as a worker in, a place to which the public has access whether on payment or otherwise, subjects such other person to any kind of discrimination.

Sweden

[*19 January 1976*]

(1) In Sweden, the international agreements concluded by that State do not directly become part of Swedish law. The traditional technique used in Sweden is to implement the corresponding obligations in an independent Swedish statute. This is not necessary however where domestic law already contains provisions which satisfy the requirements of the agreement.

(2) It follows from what has been said that the Swedish courts and administrative authorities do not directly apply the provisions of the International Covenants on Human Rights, for example when dealing with a case involving the implementation of human rights and fundamental freedoms, but they apply those provisions of Swedish law which embody the rights and freedoms in question.

(3) The Swedish Constitution provides that regulations relating to certain specified matters shall be laid down by law. Within this field one finds, *inter alia*, provisions on the relationship between individuals and the community that concern obligations for the individual or otherwise interfere with the personal or economic affairs of the individual. The basic provision on the subject is found in article 3 of chapter 8, which reads:

> "Provisions concerning the relations between private subjects and the community which concern obligations incumbent upon private subjects or which otherwise interfere in the personal or economic affairs of private subjects shall be laid down by law.
>
> "Such provisions are, *inter alia*: provisions which restrict the freedoms or rights, or such other protection which is granted Swedish nationals under Articles 1 to 3 of Chapter 2, provisions regarding criminal acts and the legal consequences of such acts, provisions regarding taxes payable to the State, and provisions regarding requisition and other such disposition."

(4) The Constitution empowers, however, the Parliament to a certain extent to authorize by law the Government to issue regulations by way of decrees as far as matters dealt with in article 3 are concerned. The areas within which such authorization may be given are defined in the Constitution.

(5) Provisions shall also be laid down by law in respect of the status of individuals and their interrelationships. Article 2 of chapter 8 thus stipulates:

> "Provisions relating to the personal status of private subjects or to their personal and ecomonic interrelationships shall be laid down by law.
>
> "Such provisions are, *inter alia*:
>
> "1. provisions concerning Swedish citizenship;
>
> "2. provisions concerning the right to a family name, or concerning marriage and parenthood, heritage and testaments, or other family affairs;
>
> "3. provisions concerning the right to real estate and movable property, concerning contracts, or concerning companies, associations, communities and foundations."

(6) It should be noted that, according to the Constitution, the Parliament alone enacts laws. Any adopted act of law shall be promulgated by the Government without delay. Furthermore, no law shall be amended or repealed otherwise than by law.

(7) Courts and administrative authorities have a certain controlling function in respect of the compatibility of laws and regulations with the Constitution. As for a regulation issued by the Government by decree, it is, thus, in principle incumbent upon these organs to satisfy themselves that it was within the competence of the Government to issue the regulation in question. Similarly, courts and administrative authorities have to make a formal examination of the laws enacted by the Parliament when applying these laws. Theoretically, these organs should examine not only whether an act of law has been adopted and whether the decision was, from a formal point of view, taken in conformity with the Constitution, but they should, at the same time, examine whether the contents of the law are in conformity with the Constitution. It is true, however, that the courts and administrative authorities have shown great caution in using their prerogative to examine the compatibility of laws and regulations with the Constitution, and it is generally held that a law should only be set aside if it is manifestly in conflict with the Constitution.

(8) The Constitution does not deal with the question of the individual's duty to oppose the demands of the community, in so far as they are incompatible with the purposes and principles of the various United Nations instruments in the field of human rights and fundamental freedoms. The individual has, however, the right to have his case impartially examined by the competent court or administrative authority, as the case may be.

Thailand

[*22 September 1975*]

(1) The National Constitution of the Kingdom of Thailand, chapter IV, sections 54–61, concerning the duties of the individual to the community, specifies that:

(*a*) Every person has the duty to maintain and protect the country, the religion, the King, the spirit and the principle of democracy;

(*b*) Every person has the duty to defend the country;

(*c*) Every person has the duty to serve in the armed forces in accordance with the law;

(*d*) Every person has the duty to comply with the law;

(*e*) In the exercise of the right to vote in elections and the right to vote in a referendum, every person has the duty to act in good faith;

(*f*) Every person has the duty to pay taxes and duties in accordance with the law;

(*g*) Every person has the duty to give assistance to the services of the country as specified by law;

(*h*) Every person has the duty to receive education and training under the conditions and in the manner provided by the law.

(2) The legal meaning of "duty" refers to an act that must be performed or that the individual must refrain from performing. As for "community", there is no use of the word in legal or court actions.

(3) The National Constitution grants the individual the following rights and freedoms:

(*a*) Right and freedom to follow one's own choice of religious beliefs;

(*b*) Right to speak, write, print and publish;

(*c*) Right to education;

(*d*) Freedom to assemble;

(*e*) Freedom of communication;

(*f*) Freedom to form associations;

(*g*) Freedom to form political parties.

Hence, by exercising these rights, the individual is then free to fulfil his duty to man and the community.

Ukrainian Soviet Socialist Republic[36]

[8 June 1976]

(1) In the Ukrainian SSR the relations between the individual and society are to a greater extent determined by the citizen's legal status. Under the Constitution of the Republic, citizens are granted and guaranteed a broad range of human rights and freedoms in the political, social, economic and cultural spheres.

(2) In addition, the exercise by citizens of rights and freedoms in accordance with their requirements and interests in a socialist society is inseparably linked with the fulfilment of their obligations. Like their rights, the obligations of citizens are legally set out in the Constitution of the Ukrainian SSR and are directly linked with and inseparable from those rights. The basic obligations are: to observe the Constitution, to comply with the law, to observe labour discipline, to carry out one's social duty honorably, to respect the rules of the socialist community, to protect and strengthen communal socialist property rights and to defend the country.

(3) Current legislation embodies the basic (constitutional) obligations of citizens and lays down additional requirements which are evidence of the genuine humanism of the mutual relations between the State and its citizens. For example, legislation on public health provides that citizens must be careful about their health and the health of other members of society. In the Code on Marriage and the Family of the Ukrainian SSR it is emphasized that parents must bring up their children in the spirit of the moral code of the brotherhood of communism and must look to their physical development, instruction and preparation for useful work in society.

(4) The unity of citizens' rights and duties in the Ukrainian SSR implies the duty of the State to ensure the exercise of citizen's rights and to require them to fulfil specific obligations. For example, the right to work of citizens of the Ukrainian SSR implies the obligation of the State to ensure that all able-bodied citizens have the opportunity to exercise that right. On the other hand, the duty of the citizens to work derives from the constitutional principle that labour in the Ukrainian SSR is a duty and a matter of honour for every able-bodied citizen. Thus, a citizen's right to work is matched by his duty to work.

(5) When necessary, the State may impose additional duties on citizens: compulsory labour service and requisition in cases of natural disasters, a number of supplementary obligations which may be imposed on citizens in time of war, etc. However, it may not repeal the constitutional guarantees of the exercise of human rights and freedoms.

(6) The democratic foundations of a socialist society require that each citizen conscientiously fulfil his duty to society and strictly observe the laws and rules of the socialist community. The exact, consistent and conscientious fulfilment by citizens of their obligations is a prerequisite for strengthening social law and order, the further development of socialist democracy and the normal functioning of the entire social machinery.

(7) The legislative embodiment of citizens' obligations thus implies the right of the State to require citizens to fulfil these obligations. In fact, a single right of the State corresponds to all the obligations of citizens: the right to require appropriate conduct from them. At the same time, this right of the State also takes the form of the duty of the State to provide the necessary conditions for citizens steadfastly to fulfil their obligations.

Union of Soviet Socialist Republics[37]

[6 May 1976]

(1) In the Soviet Union, relations between society as a whole and its individual members are founded on the principles of socialist democracy. The fundamental distinction between socialist democracy and all other forms of social relations consists in the fact that power is vested in the people as a whole. Not only political power in its entirety but also all social riches and the control over them are concentrated in the hands of the working people.

(2) Socialism frees the workers from capitalist exploitation, abolishes private ownership of the instruments and means of production and establishes the equal duty of all to work according to their ability and the equal right of workers to be paid according to the work performed.

(3) The citizens of a socialist State take an active part in the exercise of political power and State activity. This is the expression of true democracy based on the wide involvement of the people in the control of social and State affairs.

(4) The functioning of the political and economic structure of socialism serves to establish and strengthen the objective identity of fundamental social and individual interests, of the principal vital objectives of the State and the citizen, of society and the individual. Relations between a socialist State and the citizen are formed on the basis of unity and co-operation between the individual and society. The unification and co-ordination of the efforts of the State and its citizens in solving the tasks of socialist and communist development are placed in the foreground. The harmonious combination of State and individual interests in social life under socialism represents one of the most important elements of socialist democracy.

(5) Socialist democracy grants to the workers the widest rights and liberties on the basis of equality, without any discrimination whatsoever. These rights are assured and guaranteed by the socialist structure, by society as a whole, with which the individual is indissolubly linked in all fields and spheres of his activity.

(6) Within the range of the numerous and multifarious links between the individual and society under socialism, an important role is given to legal relationships, i.e. those which are regulated by rules of law. Among the rules of socialist law which determine the legal position of citizens in their interrelationship with society, the set of constitutional (fundamental) rights and duties of citizens set out in the Constitution (Fundamental Law) of the USSR (chap. X, arts. 118–133) occupies a special place. The proclamation of the rights and duties of citizens in the Fundamental Law of the USSR means that the Soviet State, acting on behalf of society, undertakes to ensure by all the means at its disposal, on the one hand, the enjoyment of those rights and, on the other hand, the fulfilment by all citizens of their duties. Thus the relations between society and the individual, the socialist State as a whole and each one of its citizens separately are constitutionally laid down.

(7) The fundamental rights and duties of citizens set out in the Constitution represent a list of reciprocal rights and duties of citizens and State. By the same token, the institution of constitutional rights and duties gives concrete expression to the bilateral nature of the legal relationship between the socialist State and its citizens. The distinction of principle between socialist and bourgeois law is that under socialism the citizen's duties to the community are inseparable from his rights and are regarded as being indissolubly linked with them.

(8) The institution of constitutional rights and duties of citizens of the USSR is of equally vital importance to the individual and to society. The exercise of citizens' rights and liberties not only corresponds to their needs and interests but is also an essential condition for the normal functioning of society as a whole. At the same time, the fulfilment by citizens of their constitutional duties is a most important precondition for the untrammelled enjoyment of their rights and for guaranteeing the conditions necessary for such enjoyment. The fundamental rights and duties of citizens of the USSR represent the direct expression of the principle, inherent in socialist society, whereby the interests of the individual are viewed as social interests, and those of society as the interests of the individuals of whom society is formed. The combination of individual and social interests is an essential feature of socialist society.

(9) In affirming man to be the most precious good, socialist law does not refer to the human personality *in abstracto*, not to man in general, but to man in socialist society. Such a man is an individual with a developed sense of the collective, an understanding of the importance of his social functions and an awareness of belonging to the people—the greatest social force, performing tasks of world-historical significance.

(10) The constitutional duties of Soviet citizens include the duty to observe the laws of the USSR, to maintain labour discipline, honestly to perform public duties, to respect the rules of socialist society, to safeguard and fortify public property, to defend the socialist

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[36] A new Constitution (Fundamental Law) of the Ukrainian Soviet Socialist Republic was adopted in 1978. See also paragraph 95 below, in reference to the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics adopted on 7 October 1977, chapter 7 of which is entitled "The basic rights, freedoms and duties of citizens of the USSR".

[37] A new Constitution (Fundamental Law) of the Union of Soviet Socialist Republics was adopted at the seventh (special) session of the Supreme Soviet of the USSR, Ninth Convocation, on 7 October 1977. Chapter 7 (arts. 39–69) is entitled "The basic rights, freedoms and duties of citizens of the USSR" (see para. 95 below).

fatherland, etc. Constitutional duties presuppose the State's right, established by law, to demand their fulfilment from the citizens. This is an essential pre-condition of the maintenance of public order, the normal functioning of the entire mechanism of socialist society, and the further development of socialist democracy.

(11) The duties of citizens laid down in Soviet law meet not only the interests of society and of the State as a whole but also those of each individual citizen. Thus, for example, eight-year education in the USSR is not only the right but also the duty of every citizen. Accordingly, sending children to school is not only the moral right of parents but also their duty, the non-fulfilment of which contradicts the public interest and public morality. Similarly, the right to work includes the duty of all to work and maintain labour discipline.

(12) The creation of favourable conditions for giving effect to and protecting the rights of citizens is one of the most important tasks and principal functions of the socialist State. This purpose is served by a ramified system of economic, political, ideological, organizational and legal guarantees. The presentation of material and other guarantees of the exercise of the rights and freedoms of citizens, wherein the unconditional duties of society to each of its members find expression, is an important feature of Soviet legislation determined by the country's Fundamental Law. For example, article 120 of the Soviety Constitution, establishing the right of citizens of the USSR to maintenance in old age and also in case of sickness or disability, provides that "this right is ensured by the extensive development of social insurance of industrial, office, and professional workers at State expense, free medical service for the working people and the provision of a wide network of health resorts for the use of the working people."

(13) Constitutional rights and freedoms in socialist society lay down the right of citizens to receive from the State and society the necessary material conditions for their existence, the satisfaction of their socio-cultural and spiritual needs, their participation in the control of social and State affairs, and their personal freedom.

(14) The rights and duties of citizens in a developed socialist society will, as the society advances towards communism, undergo certain qualitative changes which will eventually lead to their transformation into unified norms of communist society. In the Programme of the Communist Party of the Soviet Union it is stated: "The entire system of State and public organization educates the workers in a spirit of voluntary, conscientious fulfilment of their duties and leads to the organic amalgamation of rights and duties into unified norms of communist society".

VENEZUELA

[*29 July 1976*]

(1) The notion of community should comprise the State entity, made up of the following elements: territory, population and power.

(2) The territory is defined in the Constitution in the following terms:

"*Article 7*. The national territory is that which belonged to the Captaincy General of Venezuela before the political transformation initiated in 1810, with the modifications resulting from treaties concluded by the Republic.

"The Sovereignty, authority and vigilance over the territorial sea, the contiguous maritime zone, the continental shelf and the air space, as well as the ownership and exploitation of property and resources contained within them, shall be exercised to the extent and under the conditions determined by law."

(3) The population is composed of all persons in the territory, whether nationals or foreigners. Power is understood in two senses: from the top downwards, which prevents anarchy; and from the bottom upwards, which is the will of the people democratically expressed.

(4) The community, identified in this case with the reality of the State, imposes duties and limitations on individuals in the exercise of their rights.

(5) The Venezuelan Constitution distinguishes between the two concepts referred to in the preceding paragraph as duties and limitations.

(6) Duties are prescribed in the Fundamental Law of Venezuela in two ways:

(*a*) In title III, chapter II, of the Constitution, entitled "Duties", which reads:

"*Article 51*. It shall be the duty of Venezuelans to honour and defend their country, and to safeguard and protect the interests of the nation.

"*Article 52*. Both Venezuelans and aliens shall comply with and obey the Constitution and the laws, and the decrees, resolutions and orders issued by legitimate agencies of the Public Power in the exercise of their functions.

"*Article 53*. Military service shall be compulsory and shall be rendered without distinction as to class or social condition, for the periods and on the occasions fixed by law.

"*Article 54*. Labour is a duty of every person fit to perform it.

"*Article 55*. Education shall be compulsory within the degree and conditions fixed by law. Parents and representatives are responsible for compliance with this duty and the State shall provide the means by which all may comply with it.

"*Article 56*. Every person shall be bound to contribute to the public expenditures.

"*Article 57*. The obligations that are incumbent upon the State with respect to the assistance, education and well-being of the people shall not exclude those which, by virtue of social solidarity, are incumbent on individuals according to their capacity. The law may impose compliance with these obligations in those cases where it may be necessary. It may also impose on persons who aspire to practise specified professions, the duty of rendering service for a certain time in the places and under the conditions indicated."

(*b*) In addition to the foregoing duties, various parts of the Constitution contain rules such as the following:

(i) The obligation to submit to health measures:

"*Article 76*. Every person shall have the right to protection of his health.

"The authorities shall supervise the maintenance of public health and shall provide the means of prevention and attention for those who lack them.

"Every person shall be bound to submit to the health measures established by law, within limits imposed by respect for the human person."

(ii) The obligation to belong to a professional association:

"*Article 82*. The professions that require a diploma and the conditions for the exercise thereof shall be determined by law.

"Professional association (*colegiación*) is compulsory for the practice of those university professions that are determined by law."

(iii) The duty to vote:

"*Article 110*. Voting is a right and a public function. Its exercise shall be compulsory, within the limits and conditions established by law."

D. Comments by specialized agencies relating to the individual's duties to the community

65. The Secretary-General, on behalf of the Special Rapporteur, transmitted to specialized agencies a questionnaire in connection with the present study. The following information relating to the duties of the individual to the community was received in response to the questionnaire:[38]

INTERNATIONAL LABOUR ORGANISATION (ILO)

[*17 September 1975*]

(a) *General comments*

(1) In general, ILO conventions are not directly concerned with the duties of the individual to the community. Certain provisions, however, can be considered as recognizing such duties, and attention might be drawn in particular to the Forced Labour Convention, 1930 (No. 29), article 2, paragraph 2 (*a*), (*b*), (*d*) and (*e*), which provides:

"2. Nevertheless, for the purposes of this Convention, the term 'forced or compulsory labour' shall not include:

"(*a*) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;

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[38] The replies of the specialized agencies were received on the dates shown in parentheses following the name of the agency.

"(*b*) any work or service which forms part of the normal civil obligations of the citizens of a fully self-governing country;

". . .

"(*d*) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

"(*e*) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services."

(b) *Jurisprudence relating to the individual's duties to the community*

Duty to perform compulsory military service (Convention No. 29, art. 2, para. 2 (a))

(2) Under this provision "work or service exacted in virtue of compulsory military service laws for work of a purely military character" is excluded from the term "forced or compulsory labour". The Committee of Experts on the Application of Conventions and Recommendations (subsequently referred to as the Committee of Experts) has consistently emphasized that it is only work of a purely military character that is excluded from the definition of forced labour, and has thus considered the assignment of conscripts to other work (such as agricultural work, public works, construction works) to be incompatible with the Convention (Report of the Committee of Experts,[39] 1962, part three, paras. 77–78; *ibid.*, 1964, pp. 71–72).

Work or service which forms part of normal civic obligations of the citizens of a fully self-governing country (Convention No. 29, art. 2, para. 2 (b))

(3) Examples of work which the Committee of Experts has considered as forming part of normal civic obligations, and thus excluded from the term "forced or compulsory labour", include the following:

". . . compulsory jury service, the duty to assist a person in danger or to assist in the enforcement of law and order" (Report of the Committee of Experts, 1968, part three, para. 37).

(4) On the other hand, the Committee of Experts has held that compulsory labour on public works such as road construction is not a normal civic obligation; this concept applies only to works of maintenance and cleaning of local roads with the exception of paved roads (Report of the Committee of Experts, 1954, p. 29).

Work or services exacted in cases of emergency (Convention No. 29, art. 2, para. 2 (d))

(5) The Committee of Experts has consistently insisted on the observance of all the requirements of this exception to the definition of the term "forced or compulsory labour", i.e. there must be a genuine and present emergency endangering the existence or well-being of the whole or part of the community of the kind illustrated in the wording of the Convention; the power to exact labour must be limited to the period of the emergency; and the compulsory labour imposed must be strictly necessary to deal with the exigencies of the emergency situation (see, in particular, the Report of the Committee of Experts, 1962, part three, paras. 59–61, 63 and 85–86; *ibid.*, 1968, part three, paras. 39 and 51–54). Examples of legislation related to emergencies but worded in terms permitting the call-up of labour in a wider range of circumstances include the following:

(*a*) Legislation permitting the requisition of the services of the employees of an undertaking or service whose efficiency is endangered "when circumstances so demand" (Report of the Committee of Experts, 1962, p. 53);

(*b*) Legislation permitting the call-up of civilians to satisfy the needs of national defence, which was defined as comprising all measures taken by the State to protect the vital interests of the nation from substantial interference and disturbance (*ibid.*, 1968, pp. 50–51);

(*c*) Legislation permitting the call-up of civilians "to meet abnormal situations of any kind liable to impair or to disturb the economic or social life of the country" (*ibid.*, 1970, pp. 64–65);

(*d*) Legislation permitting compulsory labour in case of shortage of manpower for carrying out important state work (*ibid.*, 1971, p. 78).

Minor communal services (Convention No. 29, art. 2, para. 2 (e))

(6) The Committee of Experts has spelled out the general principles governing minor communal services falling outside the scope of the Convention as follows:

(*a*) The services must be "minor", that is to say essentially maintenance work and, in exceptional cases, the erection or improvement of buildings to improve the social conditions of the population itself (a small school, a medical consultation and treatment room, etc.);

(*b*) The services must be "communal" services performed "in the direct interest of the community" of the village and not works intended to benefit a much wider group;

(*c*) Finally, the population itself, i.e. the members of the community which have to perform the services or their direct representatives, e.g. the village council, must have the right to be consulted in regard to the need for such services (Report of the Committee of Experts, 1962, part three, para. 66; *ibid.*, 1968, part three, para. 40).

UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION
(UNESCO)

[*3 September 1975*]

(1) The duties mentioned most frequently seem to be the duty to work, the duty to pay taxes and the duty to defend one's country.

(2) An interesting concept is that of the correlation between the duty to educate oneself and the duty to use one's knowledge for the good of the community. Thus, an individual has a right to education and a right to work in which this knowledge can be used. This leads to the idea that the planning of education and of technical training is necessary if a person is to be able to exercise his right to fulfil his duty to the community. Although in most cases this involves a right to non-interference by the State (not preventing the individual from working, from doing his military service, etc.), this right becomes a claim in contemporary society, since the State must act to make it possible for the duty to be done (full employment, construction of schools, creation of conditions for national service which respect human dignity, etc.).

(3) The ability of a State to render possible the fulfilment of the individual's duties, in freedom, is perhaps a more valid criterion than the "formal freedoms" evaluating effective respect for human rights.

(4) The interpretation and meaning of the words "his duty to man" may, for example, be the consequence of religious precepts such as the act of conversion, refusal to accept a blood transfusion, etc.

WORLD HEALTH ORGANIZATION
(WHO)

[*19 September 1975*]

There are certain provisions of national legislation dealing with obligations of the citizen such as: to provide first aid in emergencies or urgent cases, within the limits of their abilities; to submit to health examinations or vaccinations for the prevention of communicable diseases (as well as the related provisions regarding compensation for serious consequences of vaccination complications suffered as the result of mandatory or publicly recommended vaccination); to notify the health authorities when suffering from communicable diseases (including venereal diseases) or having been exposed to infection and to undergo examination, treatment, surveillance, isolation or hospitalization (the latter measures may at the same time constitute a limitation of the freedom of movement and the right to liberty and security of the individual).

E. Review of constitutional and other provisions in selected legal systems of States Members of the United Nations relating to the individual's duties to the community

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[39] The Report of the Committee of Experts on the Application of Conventions and Recommendations is published each year as Report III (Part 4) to the International Labour Conference.

66. In order to present a more complete comparative review of the constitutional, legislative and regulatory provisions relating to the individual's duties to the community and to draw certain conclusions, the Special Rapporteur has taken into consideration not only the replies submitted by Governments and specialized agencies (see sections C and D above) but also relevant provisions of the legal systems of the following States Members of the United Nations:

ALBANIA

67. The Constitution of Albania[40] of 14 March 1946, revised on 4 July 1950 and amended in 1953, 1954 and 1958, provides in chapter III, articles 14 to 40, for the rights and duties of citizens. The most important provisions relating to the duties of the citizens are the following:

> *Article 14.* All citizens are equal before the law. It is their duty to comply with the Constitution and the laws. . . .
>
> *Article 19.* . . .
>
> Parents have the same obligations and duties towards the children born outside their marriage as they have towards children born within their marriage. . . .
>
> *Article 35.* Every citizen is duty-bound to safeguard and consolidate social property (state and co-operative property), the sacred and inviolable basis of the people's democracy, the source of power of the Fatherland, of the welfare and culture of all the working people.
>
> Those who lay hands on social property are enemies of the people.
>
> *Article 36.* Protection of the Fatherland is the supreme duty and the highest honour of every citizen. Betrayal of the people is the greatest felony. Military service is compulsory for all citizens.
>
> *Article 37.* All citizens are obliged to pay taxes in proportion to their economic possibilities. . . .

BOTSWANA

68. The Constitution of Botswana[41] of 30 September 1966, as amended in 1969 and 1970, provides, *inter alia*:

> *Section 6.* (1) No person shall be held in slavery or servitude.
>
> (2) No person shall be required to perform forced labour.
>
> (3) For the purposes of this section, the expression "forced labour" does not include–
>
> (c) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service;
>
> . . .
>
> (*e*) any labour reasonably required as part of reasonable and normal communal or other civic obligations.

BULGARIA

69. The Constitution of Bulgaria,[42] adopted on 4 December 1947, amended in 1961 and 1965, provides, *inter alia*:

> *Article 73.* Citizens have the right to work.
>
> . . .
>
> Work is a duty and a matter of honor for every able-bodied citizen. It is the duty of every citizen to engage in socially useful labor and work according to his powers and ability.
>
> Citizens' labor service obligations are determined by a special law.
>
> *Article 90.* The defence of the country is a supreme duty and a matter of honor for every citizen . . .
>
> *Article 91.* Military service is compulsory for all citizens in accordance with the special laws.
>
> *Article 92.* Citizens are bound to observe the Constitution and the laws of the country strictly and conscientiously.
>
> *Article 93.* Citizens are bound to protect national property and by all their actions to help promote the nation's economic, cultural and defensive power and the welfare of the people.
>
> *Article 94.* The citizens' tax obligations are repartitioned in accordance with their paying ability. The obligations and exemptions from them are established only by law.

CHINA

70. The Constitution of the People's Republic of China,[43] adopted on 5 March 1978 by the Fifth National People's Congress of the People's Republic of China at its first session, provides in chapter III for the following duties of Chinese citizens:

> *Article 56.* Citizens must support the leadership of the Communist Party of China, support the socialist system, safeguard the unification of the motherland and the unity of all nationalities in our country and abide by the constitution and the law.
>
> *Article 57.* Citizens must take care of and protect public property, observe labour discipline, observe public order, respect social ethics and safeguard state secrets.
>
> *Article 58.* It is the lofty duty of every citizen to defend the motherland and resist aggression.
>
> It is the honourable obligation of citizens to perform military service and to join the militia according to the law.

COLOMBIA

71. The Political Constitution of Columbia[44] of 4 August 1886, as amended up to 1960, states the following:

> *Article 10.* It is the duty of all nationals and foreigners in Colombia to live in submission to the Constitution and to respect and obey the authorities.
>
> *Article 50.* The laws shall regulate the civil status of all persons and define their consequent rights and duties. . . .
>
> *Article 51.* The laws shall determine the responsibility to be incurred by public officials of all classes who violate the rights guaranteed by this title.
>
> *Article 165.* All Colombians are bound to bear arms when public necessity so requires, in order to defend the independence of the Nation and the institutions of the country. . . .

COSTA RICA

72. The Constitution of the Republic of Costa Rica[45] of 7 November 1949, as amended up to 1963, provides the following:

> *Article 18.* Costa Ricans must observe the Constitution and the laws, must serve and defend their country, and contribute to the public expenses.
>
> *Article 56.* Labor is a right of the individual and obligation to society . . . .

Further, title VIII, under the title "Political rights and duties, Chapter I. Citizens", states:

> *Article 90.* Citizenship is the aggregate of political rights and duties which pertain to Costa Ricans of either sex, over twenty years of age.

CUBA

73. The Fundamental Law of Cuba[46] of 7 February

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[40] A. J. Peaslee, *Constitutions of Nations*, revised 3rd ed. (The Hague, Martinus Nijhoff), vol. III (1968), pp. 6–17.

[41] A. P. Blaustein and G. H. Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y., Oceana Publications), vol. II, Botswana (issued July 1972).

[42] Peaslee, *op. cit.*, revised 3rd ed., vol. III (1968), pp. 96–110.

[43] *Peking Review*, No. 11, 17 March 1978, pp. 5–14.

[44] Peaslee, *op. cit.*, revised 3rd ed., vol. IV (1970), pp. 279–323.

[45] *Ibid.*, pp. 328–362.

[46] *Ibid.*, pp. 367–422.

1959, as amended in 1959, 1960, 1961 and 1962, provides the following:

Article 8. Citizenship involves duties and rights, the adequate exercise of which shall be regulated by law.

Article 9. Every Cuban is obligated:

(*a*) To serve his country with arms in those cases and in the manner established by law;

(*b*) To contribute to the public expenditures in the manner and amount provided by law;

(*c*) To comply with the Fundamental Law and the Laws of the Republic and to conduct himself in a civic manner, inculcating this practice in his own children and those under his care, instilling in them the purest national conscience.

Article 97. Universal, equal, and secret suffrage is established for all Cuban citizens as a right, duty, and function.

This function shall be compulsory and everyone who fails to vote at an election or referendum, except for an impediment admitted by law, shall be subject to the penalties imposed on him by law and shall be ineligible to hold any magistracy or public office of any kind for two years from the date of the infraction.

CYPRUS

74. The Constitution of Cyprus[47] contains the following basic provision:

Article 24. 1. Every person is bound to contribute according to his means towards the public burdens.

CZECHOSLOVAKIA

75. The Constitution of Czechoslovakia[48] of 11 July 1960 provides the following in chapter II, relating to the duties of the individual to the community:

Article 19. (1) In a society of the working people in which exploitation of man by man has been abolished, the advancement and interests of each member are in accord with the advancement and interests of the whole community. The rights, freedoms and duties of citizens shall therefore serve both the free and complete expression of the personality of the individual and the strengthening and growth of socialist society; they shall be broadened and deepened with its development.

(2) In a society of the working people the individual can fully develop his capabilities and assert his true interests only by active participation in the development of society as a whole, and particularly by undertaking an appropriate share of social work. Therefore, work in the interests of the community shall be a primary duty and the right to work a primary right of every citizen.

Article 20. (1) All citizens shall have equal rights and equal duties.

DOMINICAN REPUBLIC

76. The Constitution of the Dominican Republic of 28 November 1966,[49] in section II of title II, entitled "Duties", provides:

Article 9. Recognizing that the privileges granted and guaranteed in the preceding article of this Constitution presume the existence of a correlative legal and moral responsibility that is binding on the conduct of man in society, the following are declared to be fundamental duties:

(*a*) To respect and comply with the Constitution and the laws; to respect and obey the authorities established by them.

(*b*) Every able-bodied Dominican has the duty to perform the civilian and military services his country may require for its defence and preservation.

(*c*) The inhabitants of the Republic must refrain from any act prejudicial to its stability, independence, or sovereignty and, in the event of public disaster, they have the duty of rendering any services of which they are capable.

(*d*) Every Dominican citizen has the duty to vote, provided he has the legal capacity to do so.

(*e*) To contribute to his public expenditures in proportion to his taxable capacity.

(*f*) Every person has the obligation to engage in work of his own choice in order to provide fittingly for the maintenance of himself and his family, to achieve the broadest possible improvement of his personality, and to contribute to the well-being and progress of society.

(*g*) It is a duty of all persons who inhabit the territory of the Dominican Republic to attend the educational institutions of the nation in order to acquire, at least, an elementary education.

(*h*) Every person has the duty to co-operate with the state in respect of social assistance and social security, in accordance with his possibilities.

(*i*) Every foreigner has the duty to refrain from participating in political activities within Dominican territory.

Article 10. The enumeration contained in Articles 8 and 9 is not restrictive and hence does not exclude the existence of other rights and duties of the same nature.

EGYPT

77. The Constitution of the Arab Republic of Egypt[50] of 11 September 1971 provides, *inter alia*, the following:

Article 3. Sovereignty belongs to the people who are the sole source of power. The people shall exercise this sovereignty, shall protect and safeguard national unity in the manner established by the Constitution.

Article 13. Work is a right, a duty and an honor guaranteed by the State. . . .

Article 14. Public duties are a right of citizens and a responsibility for those who undertake them in the service of the people. . . .

Article 21. The eradication of illiteracy is a national duty for the realization of which all the powers of the people must be mobilized.

Further, title III of the Constitution, relating to liberties, rights and public duties, provides, *inter alia*, the following:

Article 40. Citizens are equal before the law. They have equal rights and public duties without distinction of race, origin, language, religion or creed.

Article 58. The defence of the country and its territory is a sacred duty and military service is obligatory in accordance with the law.

Article 59. The protection and strengthening of the socialist achievements is a national duty.

Article 60. The preservation of the national unity and State secrets is the duty of all citizens.

Article 61. Payment of taxes and public charges is a duty in accordance with the law.

Article 62. The citizen has the right of election, the right to be a candidate and to express his opinion in the course of referenda, in accordance with the provisions of the law. Participation in public life is a national duty.

FINLAND

78. The Constitution Act of Finland[51] of 17 July 1919, as amended in 1947, 1956 and 1957, contains certain provisions relating to the duties of the individual to the community:

Article 9. The fact of belonging to any special religious community or of not belonging to any such community shall in no way detract from the rights and duties of Finnish citizens. In respect to public posts and offices restrictions defined by law shall, however, remain in force until otherwise enacted.

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[47] *Ibid.*, vol. III (1968), pp. 138–221. See also C. G. Tornaritis, "The human rights as recognized and protected by law with special reference to the law of Cyprus", communication made to the Colloquium on Human Rights held at Berlin from 4 to 8 October 1966, issued by the Public Information Office, Cyprus, 1967, pp. 10–15.

[48] Peaslee, *op. cit.*, revised 3rd ed., vol. III (1968), pp. 225–249.

[49] *Ibid.*, vol. IV (1970), pp. 427–455.

[50] Peaslee, *op. cit.*, revised 4th ed., vol. I (1974), pp. 152–174.

[51] Peaslee, *op. cit.*, revised 3rd ed., vol. III (1968), pp. 271–307.

Article 75. Every Finnish citizen must take part in, or make his contribution to, the defence of the country as prescribed by law. . . .

FRANCE

79. The French Constitution[52] adopted by the Referendum of 28 September 1958 and promulgated on 4 October 1958, as amended on 18 May 1960, 28 October 1962 and 30 December 1963, provides, *inter alia*, the following:

Article 34. . . .

Laws shall establish the regulations concerning:

Civil rights and the fundamental guarantees granted to the citizens for the exercise of their public liberties; the obligations imposed by the national defense upon the persons and property of citizens;

GABON

80. The Constitution of the Republic of Gabon[53] of 21 February 1961, amended in 1966 and 1968, provides, in the preamble:

The Gabonese people, conscious of their responsibility before God, moved by a determination to safeguard their independence and national unity and to order community life according to the principles of social justice, reaffirm solemnly the rights and liberties of man defined in 1789 and consecrated by the Universal Declaration of [Human Rights] in 1948. . . .

Further, article 1, paragraph (10), provides:

The care to be given to children and their education shall constitute, for parents, a natural right and a duty which they shall exercise under the surveillance and with the assistance of the State and public collectivities. . . .

GUINEA

81. The Constitution of the Republic of Guinea[54] of November 1958 provides, in the preamble:

The State of Guinea adheres fully to the Charter of the United Nations and to the Universal Declaration of Human Rights. It proclaims the equality and solidarity of all its citizens without distinction as to race, sex or creed. . . .

In title X, under the heading "On the rights and fundamental duties of citizens", it also states the following:

Article 47. All citizens of the Republic of Guinea shall conform to the Constitution and other laws of the Republic, pay their taxes and fulfil in an honest manner their civic duties.

Article 48. The defense of the nations is the sacred duty of every citizen of the Republic of Guinea.

ITALY

82. The Constitution of Italy[55] of 27 December 1947, as amended on 11 March 1953 and 9 February 1963, states the following under the heading "Basic principles":

Article 2. The Republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which his personality finds expression, and imposes the performance of unalterable duties of a political, economic and social nature.

Article 4. . . .Every citizen shall undertake, according to his possibilities and his own choice, an activity or a function contributing to the material and moral progress of society.

Further, in part one, "Rights and duties of private citizens", the following articles appear.

Under title I, "Civil relations":

Article 28. Officials and employees of the State and of public bodies are directly responsible, according to the criminal, civil and administrative laws, for acts committed in violation of rights. In such cases, civil responsibility extends to the State and to public bodies.

Under title II, "Ethical and social relations":

Article 30. It is the duty and right of parents to support, instruct and educate their children, even those born out of wedlock. . . .

Under title III, "Economic relations":

Article 37. Female labour enjoys equal rights and the same wages for the same work as male labour. Conditions of work must make it possible for them to fulfil their essential family duties and provide for the adequate protection of mothers and children. . . .

Under title IV, "Political relations":

Article 48. All private citizens, male or female, who are of age, are entitled to vote. Votes are personal, equal, free and secret. To vote is a civic duty. . . .

Article 52. The defence of the country is a moral duty of every citizen. Military service is compulsory, within the limits and in the manner laid down by law. The fulfilment of military duty shall not prejudice the employment of the person concerned, nor the exercise of his political rights. . . .

Article 53. Everyone shall contribute to public expenditure in proportion to his resources . . .

Article 54. All citizens have the duty of fealty to the Republic and shall respect the Constitution and the laws.

Citizens to whom public functions are entrusted shall execute them in a disciplined and honorable manner swearing an oath to fulfil such conditions in those cases prescribed by law.

KENYA

83. The constitution of Kenya[56] of 12 December 1963, as revised in 1965 and further amended in 1967, states, *inter alia*, the following:

Article 17. (1) No person shall be held in slavery or servitude.

(2) No person shall be required to perform forced labour.

(3) For the purposes of this section, the expression "forced labour" does not include:

(*e*) any labour reasonably required as part of reasonable and normal communal or other civic obligations.

LIBYAN ARAB JAMAHIRIYA

84. The provisional Constitution of Libya[57] of 11 December 1969 provides:

Article 16. Defense of the homeland is a sacred duty. Military service is an honor for the Libyan people.

Article 17. No tax will be imposed, modified or cancelled and no one will be exempted from paying taxes except in accordance with the law.

MEXICO

85. The Constitution of Mexico[58] of 31 January 1917, as amended to 11 October 1966, provides the following:

Article 5. No one can be compelled to render personal services without due remuneration and without his full consent, excepting labor imposed as a penalty by the judiciary, which shall be governed by the provisions of clauses I and II of Article 123.

Only the following public services shall be obligatory, subject to the conditions set forth in the respective laws: military service and jury service as well as the discharge of the office of municipal councilman and offices of direct or indirect popular election. Duties in relation to elections and the census shall be compulsory and unpaid. Professional services of a social character shall be compulsory and paid according to the provisions of law and with the exceptions fixed thereby . . .

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[52] *Ibid*., pp. 312–330.

[53] Blaustein and Flanz, *op. cit*., vol. V, Gabon (issued February 1974).

[54] Peaslee, *op. cit*., revised 3rd ed., vol. I (1965), pp. 232–238.

[55] *Ibid*., vol. III (1968), pp. 500–527.

[56] *Ibid*., vol. I (1965), pp. 257–418.

[57] Blaustein and Flanz, *op. cit*., vol. VII, Libya (issued February 1974).

[58] Peaslee, *op. cit*., revised 3rd ed., vol. IV (1970), pp. 891–954.

Further, article 36 provides that:

The obligations of citizens of the Republic are:

I. To register on the tax lists of the municipality declaring the property they possess, the industry, profession, or occupation by which they subsist; and also to register in the electoral poll-books, according to the provisions prescribed by law;

II. To enlist in the National Guard;

III. To vote in popular elections in the electoral district to which they belong;

IV. To serve in the elective offices in the Federation or of the States, which shall in no case be gratuitous;

V. To serve council positions where they reside, and to fulfil electoral and jury functions.

MONGOLIA

86 The Constitution of the Mongolian People's Republic of 6 July 1960[59] in chapter eight, entitled "The fundamental duties of the citizens", states the following:

Article 89. It is the duty of every citizen of the Mongolian People's Republic:

(*a*) to devote all his efforts and knowledge to the building of socialism, remembering that honest and conscientious work for the benefit of society is the source of the increasing wealth and might of the socialist state and of the rising living standard of the working people;

(*b*) to conform strictly to the Constitution of the Mongolian People's Republic, abide strictly by the laws and observe labour discipline, adhere to the rules of the socialist way of life and struggle actively against all anti-social manifestations;

(*c*) to ensure the unity of personal and social interests and give priority to social and state interests;

(*d*) to safeguard, as something dear to him, the sacred and inviolable foundation of the socialist system—public socialist property—and to do everything to strengthen and increase it;

(*e*) to regard the strengthening of international friendship between peoples as an objective necessity, and in his own practical work to promote greater friendship and solidarity among the working people, to promote the unity and solidarity of the peoples of the socialist camp, headed by the Soviet Union, to struggle with determination against all manifestations detrimental to this sacred friendship and unity;

(*f*) to train the rising generation in a spirit of industry, discipline and organization, collectivism and respect for the interests of society, in a spirit of a communist attitude to labour and to socialist property, a spirit of unbounded loyalty to the socialist fatherland, the ideas of communism and the principles of proletarian internationalism, in a spirit of respect for all working people regardless of their nationality;

(*g*) to promote the consolidation of the people's democratic system, to preserve strictly state secrets and to be vigilant in respect of enemies;

(*h*) to defend the socialist fatherland from its enemies as something sacred. Military service in the People's Army of the Mongolian People's Republic is the honorable duty of citizens of the Mongolian People's Republic;

(*i*) to fulfil impeccably all his civic duties and to demand the same of other citizens.

PHILIPPINES

87. The constitution of 17 January 1973 of the Republic of the Philippines,[60] in article V, entitled "Duties and obligations of citizens", states the following:

Section 1. It shall be the duty of the citizens to be loyal to the Republic and to honor the Philippine flag, to defend the State and contribute to its development and welfare, to uphold the Constitution and obey the laws, and to co-operate with the duly constituted authorities in the attainment and preservation of a just and orderly society.

Section 2. The rights of the individual impose upon him the corresponding duty to exercise them responsibly and with due regard for the rights of others.

Section 3. It shall be the duty of every citizen to engage in gainful work to assure himself and his family a life worthy of human dignity.

Section 4. It shall be the obligation of every citizen qualified to vote to register and cast his vote.

PORTUGAL

88. On 25 April 1974, the revolution in Portugal restored fundamental rights and freedoms to the people of Portugal. In the exercise of those rights and freedoms, the people's legitimate representatives met to draw up a Constitution. The Constituent Assembly affirmed the Portuguese people's decision to defend their national independence, safeguard the fundamental rights of citizens, establish the basic principles of democracy, secure the primacy of the rule of law in a democratic State and open the way to a socialist society, respecting the will of the Portuguese people and keeping in view the building of a freer, more just and more fraternal country. The Constituent Assembly, meeting in plenary session on 2 April 1976, approved the Constitution of the Portuguese Republic [61] which entered into force on 25 April 1976.

89. The above-mentioned Constitution contains in part I, entitled "Fundamental rights and duties", the following basic provisions relating to the duties of Portuguese citizens:

Article 12 (Principle of universality)

1. All citizens shall enjoy such rights and be subject to the duties laid down in the Constitution.

2. Bodies corporate shall enjoy such rights and be subject to such duties as are compatible with their nature.

Article 13 (Principle of equality)

1. All citizens shall have the same social dignity and shall be equal before the law.

2. No-one shall be privileged, favoured, injured, deprived of any right or exempt from any duty because of his ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation or social condition.

Article 14 (Portuguese citizens abroad)

Portuguese citizens sojourning or residing abroad shall enjoy the protection of the State in the exercise of their rights and shall be subject to such duties as are not incompatible with their absence from the country.

Article 15 (Foreigners and stateless persons)

1. Foreigners and stateless persons sojourning or residing in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens.

2. The foregoing paragraph shall not apply to political rights, to the performance of public duties that are not predominantly technical or to rights and duties restricted to Portuguese citizens under the Constitution and by law.

. . .

Section III of the Constitution "Economic, social and cultural rights and duties", contains the following articles. In chapter I, "General Principle":

Article 50 (Safeguards and conditions of effectiveness)

The collectivisation of the principal means of production, the planning of economic development and the democratisation of institutions are safeguards and conditions for the effectiveness of economic, social and cultural rights and duties.

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[59] *Ibid.*, vol. II (1966), pp. 751–766.

[60] *Constitution of the Republic of the Philippines* (Manila, Bureau of Printing, 1973).

[61] See: Portugal, Office of the Secretary of State for Mass Communication, *Constitution of the Portuguese Republic* (Lisbon, January 1977).

In chapter II, "Economic rights and duties":

Article 51 (Right to work)

1. Everyone shall have the right to work.

2. The duty to work is inseparable from the right to work, except for those persons whose capacities have been diminished by age, sickness or disability.

. . .

In chapter III, "Social rights and duties":

Article 64 (Health)

1. Everyone shall have the right to protection of his health and the duty to defend and foster it.

. . .

Article 66 (Environment and quality of life)

1. Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it.

. . .

Article 71 (The disabled)

1. Citizens who are physically or mentally disabled shall enjoy all the rights and be subject to all the duties embodied in the Constitution, except for the exercise or performance of those for which their disablement unfits them.

. . .

Part III of the Constitution, "Organization of political power", contains the following provisions.

In Section I, "General principles":

Article 116 (General principles of electoral law)

. . .

4. Citizens shall have the duty to collaborate with the elections administration in the forms laid down by law.

. . .

Article 120 (Responsibility of holders of political office)

1. Holders of political office shall be politically, civilly and criminally responsible for their acts and omissions in the exercise of their functions.

Under section IV, "Assembly of the Republic," in chapter I, "Status and election":

. . .

Article 162 (Duties)

Members of the Assembly shall have the following duties: (*a*) to attend plenary sittings of the Assembly and meetings of those committees to which they belong; (*b*) to discharge their responsibilities in the Assembly and perform the functions to which they are appointed on proposals by their respective parliamentary groups; (*c*) to take part in votes.

In Section X, "Armed Forces":

. . .

Article 276 (Defence of the country and military service)

1. The defence of the country is a fundamental duty of every Portuguese.

2. Military service shall be compulsory, for a period and on conditions to be laid down by law.

3. Persons considered unfit for armed military service and conscientious objectors shall perform unarmed military service or civic service suited to their situations.

4. Civic service may be established as a substitute for or as a complement to military service and may be made compulsory by law for citizens not subject to military service.

5. No citizen shall keep or obtain any office in the state or in any other public body if he fails to perform his military service or civic service, if compulsory.

6. Performance by a citizen of military service or compulsory civic service shall be without prejudice to his post, social security benefits or permanent career.

ROMANIA

90. The Constitution of the Socialist Republic of Romania[62] of 1965 provides the following in chapter II, entitled "The fundamental rights and duties of the citizens":

Article 39. Every citizen of the Socialist Republic of Romania is bound to respect the Constitution and the laws, to defend socialist property, to contribute to the strengthening and development of the socialist system.

Article 40. Military service in the ranks of the Armed Forces of the Socialist Republic of Romania is compulsory and is a duty of honour of the citizens of the Socialist Republic of Romania.

Article 41. To defend the homeland is the sacred duty of each citizen of the Socialist Republic of Romania. Violation of the military oath, treason to the homeland, desertion to the enemy, prejudice to the defensive capacity of the state are the greatest crimes against the people and are punished by the law with the utmost severity.

SPAIN

91. The approval of the Constitution by the Spanish Cortes on 31 October 1978, ratified by the Spanish people in a referendum held on 6 December 1978 and confirmed by H.M. King Juan Carlos I before the Cortes on 27 December 1978,[63] signifies the establishment in Spain of a new political and legal system for the protection of the human rights that are so extensively recognized in the Constitution.[64]

92. The Constitution which entered into force on 29 December 1978, is the framework for the future development of the entire organization of the powers and institutions of the State established as the surest guarantee of the rights of the individual. In this regard, the preamble to the Constitution provides that the Spanish nation, desirous of establishing justice, liberty and security and of promoting the well-being of its members, by virtue of its sovereignty, proclaims its intention to:

Guarantee democratic coexistence within the Constitution and the laws in accordance with a just economic and social order;

Consolidate a state of law which insures the rule of law as the expression of the popular will;

Protect all Spaniards and people of Spain in the exercise of human rights, of their cultures and traditions, languages and institutions.

. . .

This purpose is guaranteed by a "bill of rights" incorporated into the Constitution and entitled "On Basic Rights and Duties" (title I).

93. The following provisions of the Constitution are related to the duties of the citizen to the community:

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[62] Peaslee, *op. cit.*, revised 3rd ed., vol. III (1968), pp. 767–843.

[63] Blaustein and Flanz, *op. cit.*, vol. XIII, Spain (issued October 1979). For the original text, see J. de Esteban, *Constituciones Españolas y Extranjeras*, 2nd ed. (Madrid, Taurus, 1979), t. I, pp. 416 ff.

[64] See the comments of the Government of Spain on the Constitution, in document E/CN.4/1321/Add.5 of 5 March 1979.

> *Article 3.* 1. Castilian is the official Spanish language of the state. All Spaniards have the duty to know it and the right to use it.
>
> *Article 30.* 1. Citizens have the right and duty to defend Spain.
>
> 2. The law shall determine the military obligations of Spaniards and shall regulate, with all due guarantees, conscientious objection as well as other causes for exemption from compulsory military service, and it may, when appropriate, impose a substitute social service.
>
> 3. A civilian service may be established for the accomplishment of objectives of general interest.
>
> 4. The duties of citizens in cases of serious risk, catastrophe or public calamity may be regulated by law.
>
> *Article 31.* 1. All shall contribute to the sustenance of public expenditures according to their economic capacity through a just tax system based on the principles of equality and progressiveness, which in no case shall be of a confiscatory scope.
>
> *Article 35.* 1. All Spaniards have the duty to work and the right to work, to the free selection of profession or office career, to advancement through work and to a sufficient renumeration to satisfy their needs and those of their family, while in no case can there be discrimination for reasons of sex.
>
> *Article 45.* 1. Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.

TURKEY

94. The Constitution of the Turkish Republic[65] of 9 July 1961 provides, in part two, for the fundamental rights and duties of the individual. It states, *inter alia*:

> *Article 42.* It is the right and duty of every individual to be engaged in some occupation, trade or business. . . .
>
> The forms and conditions of physical and intellectual work in the nature of civic duty in cases where the needs of the country so require shall be regulated by law in accordance with democratic procedures.
>
> *Article 60.* Taking part in the defense of the homeland is the right and duty of every Turk. This duty and the obligation to serve in the armed forces shall be regulated by law.
>
> *Article 61.* To meet public expenditures every individual is under obligation to pay taxes in proportion to his financial capacity. . . .

UNION OF SOVIET SOCIALIST REPUBLICS

95. The Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, adopted at the seventh (special) session of the Supreme Soviet of the USSR, Ninth Convocation, on 7 October 1977,[66] provides in chapter 7 for the basic rights, freedoms and duties of citizens of the USSR. Article 57 provides:

> Respect for the individual and protection of the rights and freedoms of citizens are the duty of all state bodies, public organizations, and officials. . . .

Further, the following articles, in particular, are related to the duties of the individual to the community:

> *Article 59.* Citizens' exercise of their rights and freedoms is inseparable from the performance of their duties and obligations.
>
> Citizens of the USSR are obliged to observe the Constitution of the USSR and Soviet laws, comply with the standards of socialist conduct, and uphold the honour and dignity of Soviet citizenship.
>
> *Article 60.* It is the duty of, and a matter of honour for, every able-bodied citizen of the USSR to work conscientiously in his chosen, socially useful occupation, and strictly to observe labour discipline. Evasion of socially useful work is incompatible with the principles of socialist society.
>
> *Article 61.* Citizens of the USSR are obliged to preserve and protect socialist property. It is the duty of a citizen of the USSR to combat misappropriation and squandering of state and socially-owned property and to make thrifty use of the people's wealth.
>
> Persons encroaching in any way on socialist property shall be punished according to the law.
>
> *Article 62.* Citizens of the USSR are obliged to safeguard the interests of the Soviet State, and to enhance its power and prestige.
>
> Defence of the Socialist Motherland is the sacred duty of every citizen of the USSR. Betrayal of the Motherland is the gravest of crimes against the people.
>
> *Article 63.* Military service in the ranks of the Armed Forces of the USSR is an honourable duty of Soviet citizens.
>
> *Article 64.* It is the duty of every citizen of the USSR to respect the national dignity of other citizens and to strengthen frendship of the nations and nationalities of the multinational Soviet State.
>
> *Article 65.* A citizen of the USSR is obliged to respect the rights and lawful interests of other persons, to be uncompromising toward anti-social behaviour and to help maintain public order.
>
> *Article 66.* Citizens of the USSR are obliged to concern themselves with the upbringing of children, to train them for socially useful work, and to raise them as worthy members of socialist society. Children are obliged to care for their parents and help them.
>
> *Article 67.* Citizens of the USSR are obliged to protect nature and conserve its riches.
>
> *Article 68.* Concern for the preservation of historical monuments and other cultural values is a duty and obligation of citizens of USSR.
>
> *Article 69.* It is the internationalist duty of citizens of the USSR to promote friendship and co-operation with peoples of other lands and help maintain and strengthen world peace.

F. Meaning of the terms "duty" and "community"

1. MEANING OF THE TERM "DUTY"

96. "Duty" is a term loosely applied to any action or course of action which is regarded as morally or legally incumbent, apart from personal likes and dislikes. Such action must be viewed in relation to a principle which may be abstract in the highest sense, e.g. obedience to the dictates of conscience, or based on personal relations, such as the mutual duties of a father and his children, which could imply that there is a moral law or a legal rule regulating the relationship between certain persons or between the individual and the community. From the basic idea of an obligation to serve or give something in return, or to refrain from doing domething, involved in the conception of duty, have sprung various derivative uses of the word; thus, it is used of the services performed by a soldier or by a civil servant. A special application is to a tax, a payment due to the revenue of a State, levied by force of law.[67]

97. The following is the definition of the term "duty" contained in *Black's Law Dictionary*: "A human action which is exactly conformable to the laws which require us to obey them."[68]

98. It would be useful for a better conception of the word "duty" to consider, *inter alia*, the following relevant propositions:

(*a*) It can be the duty of an individual to pursue the interest of others, but he is not necessarily obligated to pursue his own interest as such;

(*b*) An action can be a duty irrespective of its consequences and an individual can know it to be a duty without knowing what its consequences will be;

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[65] Peaslee, *op. cit.*, revised 3rd ed., vol. II (1966), pp. 1156–1193.

[66] Moscow, Novosti Press Agency Publishing House, 1977.

[67] See, for example, Constitution of Tunisia of 1 June 1959, art. 16 (Peaslee, *op. cit.*, revised 3rd ed., vol. I (1965), p. 911). See also *Encyclopaedia Britannica*, vol. 7 (1967), p. 804.

[68] *Black's Law Dictionary*, 5th ed. (St. Paul, Minn., West Publishing Co., 1979), p. 453. See also, for example, the relevant provisions of the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons; the Constitution of Panama of 1946, as amended in 1956, arts. 74, 102 and 248 (Peaslee, *op. cit.*, revised 3rd ed., vol. IV (1970), pp. 1024, 1028 and 1060); the Constitution of Portugal (see above, paras. 88 and 89); and the Constitution of the USSR (see para. 95 above).

(*c*) Duties are apprehended by reason alone; in discovering what they are, no reference to emotion, desire, or liking is relevant;

(*d*) Duties may conflict. It is possible, in principle, that different commitments may be undertaken which are incompatible with each other in a particular situation. In such a case there is a conflict of duties;

(*e*) Many actions are morally neither good nor bad; a man may have no duty either to perform them or to refrain from them;

(*f*) Any action which is a duty for an individual in a given situation would also be a duty for another individual in a similar situation.[69] It often happens, in practice, that the basic obligation is a general rule which applies to all members of the community of which it is a rule;

(*g*) If an action is a duty for an individual, he is morally responsible or legally obliged to carry it out; if he does so he may acquire merit, and if he fails to do so he incurs demerit and is liable to punishment; and in the case of harm arising through his default, those to whom he has done harm are entitled to demand compensation in return;

(*h*) An individual can have no duty which he is not capable of recognizing as his duty;

(*i*) Only a rational being[70] can have a duty, and then only towards another rational being or to the community.

99. In its use in jurisprudence of the United States of America courts, the term "duty" is the correlative of the word "right". Thus, wherever there exists a right for any person, there also rests a corresponding duty upon some other person or upon all persons generally. But it is also used, in a wider sense, to designate that class of moral obligations which lie outside the jural sphere; such, namely, as rest upon an imperative ethical basis but have not been recognized by the law within its proper province for purposes of enforcement or redress. In this meaning, "duty" is the equivalent of "moral obligation" as distinguished from a "legal obligation".[71]

100. The conflict which leads some philosophers to assert and others to deny the above propositions owes something to lack of clarity in the use of the word "duty" and its approximate synonym "obligation". In moral philosophy, "duty" and "obligation" are normally used in a sense in which "my duty" or what I am "obliged" to do is equivalent to "the right thing to do", "the best thing to do", or what a virtuous man would do. In this sense, to declare what an individual's duty is in a given situation is to make a definitive recommendation as to what he should do, taking all the circumstances into account. But this sense of the words "duty" and "obligation"[72] is not their usual sense in common practice. The ordinary sense is that in which it is used in speaking and in law; for instance, we speak of "the duties of a professor", or "the duties of a judge", or "putting an individual under an obligation", or "discharging one's obligations". In this commonest sense, a duty or obligation is a consequence of a contract or undertaking, either explicit and concrete or implicit and indefinite.[73]

101. An individual has a duty to conform to the rules of the community to which he belongs, insofar as he gives others to expect that he will do so, and insofar as he takes advantage of the reciprocal conformity of other members of the community.

2. MEANING OF THE TERM "COMMUNITY"

102. The meaning of the term "community"[74] for the purpose of this study is:

(*a*) A group of people living together, e.g. a family;

(*b*) All the people living in a particular place or district e.g. neighbourhood, vicinity, village, city, etc.;

(*c*) A group of people living together as a smaller social unit within a larger one and having interests, work, etc., in common;

(*d*) A society or body of people living in the same place, under the same laws and regulations, who have common rights, privileges, or interests;[75]

(*e*) The place, or district, village, city, region, country, State, where the people live;

(*f*) A group of nations loosely or closely associated because of common traditions or for political or economic, social and cultural development and progress;

(*g*) A great number of united nations having common purposes and noble goals, such as to save succeeding generations from the scourge of war and to promote social progress and better standards of life in larger freedom, such as the "United Nations", which will be also cited as the "World Community" in the present study.

G. The relationship between the individual and the community

103. Each individual owes duties to the community; and indeed only in the community is the free and full development of the personality of the individual possible.[76] In this connection the Rapporteur takes the

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[69] Compare, for example, the relevant provisions of the constitutions of Albania, Bulgaria, China, Cuba, Czechoslovakia, Mongolia, Romania and the Union of Soviet Socialist Republics (see section E above). See also Constitution of Togo (5 May 1963), arts. 18 and 19 (Peaslee, *op. cit.*, revised 3rd ed., vol. I (1965), p. 893); and Constitution of Somalia (1 July 1960), arts. 47 and 48 (*ibid.*, p. 786).

[70] *Black's Law Dictionary*, 3rd ed. (St. Paul, Minn., West Publishing Co., 1933), p. 595.

[71] Regarding the nature of man, see Aristotle, *Politics*, Book I, English transl. by H. Rackham, Loeb Classical Library, vol XXI (London, Heinemann, 1972). See also S. R. L. Clark, *Aristotle's Man* (Oxford, Clarendon Press, 1975), pp. 2 and 97.

[72] Kant, for instance, accepted most of the duties. There is a tendency in certain modern constitutions to use the word "obligation" more often than the word "duty".

[73] For example, the Universal Declaration of Human Rights explicitly provides for the individual's duties to the community (art. 29, para. 1).

[74] For the criteria by which a community is distinguishable from a society, see G. Schwarzenberger, *The Frontiers of International Law* (London, Stevens, 1962), pp. 44–51.

[75] *Black's Law Dictionary*, 5th ed. (St. Paul, Minn, West Publishing Co., 1979), p. 254.

[76] A. Verdoodt, *Naissance et signification de la Déclaration universelle des droits de l'homme* (Louvain, Nauwelaerts, 1964), pp. 262–271.

ideal of free human beings as her guide for the purpose of this study—men and women who enjoy civil and political liberty and who live free from fear and want. The community (in this case notably the State) has first and foremost to recognize its duty towards the individual [77] and the individual has to learn of his rights and duties.

104. As Protagoras said, "Man is the measure of all things". Article 3 of the Universal Declaration states: "Everyone has the right to life, liberty and security of person." The provisions of this article are fundamental because they provide explicitly for the individual's freedom. Since the eighteenth century, the idea of freedom had become much broader. The theoretical idea of liberty has evolved into the guarantee of certain rights and, in particular, of economic, social and cultural rights. In modern times, the fundamental right of the individual is his right to develop freely and fully his personality, which implies that the community has to establish for all the factors essential to that development.

105. Individuals should live for human freedom and human dignity.[78]

106. The battle for human freedom has been going on for centuries. It has been expressed, *inter alia*, in such historic documents as the Magna Carta in 1215; the Petition of Right in 1628; the American Declaration of Independence in 1776; and the Declaration of the Rights of Man and of the Citizen in 1789. These concepts have also been written into many national constitutions in the nineteenth and twentieth centuries.[79]

107. The foundations of the socialist theory of citizens' rights and duties are contained in the works of Marx and Engels. These tenets were elaborated and further evolved in Lenin's doctrine on the socialist State and constitution. Marx and Engels, when setting the objectives for the fight waged by the working class, had in mind a society and State in which, among other things, the unity of rights and duties would be accomplished. Engels, when subjecting the Erfurt Draft Programme of 1891 to criticism, objected to it for the very reason that it contained statements on equal rights but remained silent on duties. His reflections were: "Instead of 'everyone shall have equal rights' we would suggest 'everyone shall have equal rights and duties'."

108. This idea is also expressed in the "Statutes of Organisation of the International Federation of Labour" which were drawn up by Marx and adopted by the Conference of the Federation in London in 1871. The following statement was, among others, included in the above-mentioned Statutes: "The Federation recognizes that there shall be no rights without duties and no duties without rights".[80]

109. The aforementioned Statutes also laid down the ultimate objective of the fight waged by the working class as regards citizens' rights and duties, raising equal duties to the level of equal rights. Accordingly, the principal theoretical tenet of the socialist regulation of citizens' rights—in harmony with the attainments of the working class and the new socialist socio-economic conditions—is based on the inseparable unity of the equality of citizens' rights and duties. Thus, the socialist theory of citizens' rights takes as its starting-point that citizens' rights reflect not the relationship betweeen man himself and society nor the relationship between an abstract "man" and the State. The basis is society organized in a State, and these rights should reflect the relationship between the State and its citizens. In a socialist society the relationship between citizen and State has evolved in a new manner, understandably different from the "bourgeois condition".[81]

110. Rights and duties are to some extent interrelated in certain social and political activities of man. Human duties, however, do not have the exalted status of human rights. Duties of a legal nature presuppose others of a moral nature which support them in principle and constitute their basis. The legal duty to promote respect for human rights includes the legal duty to respect them.[82]

111. Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of the individual to serve that end with all his strength and resources.

112. Since culture is the highest social and historical expression of that spiritual development, it is the duty of every individual to preserve, practice and foster culture by every means within his power.

113. And, since moral conduct constitutes the noblest flowering of culture, it is the duty of every individual always to hold it in high respect.

114. It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality.

115. As it has been repeatedly mentioned in the present study, in the Charter of the United Nations it became essential to reaffirm faith in the dignity and worth of the human person. This statement found expression in the 30 articles of the Universal Declaration and later its abstract principles were included as international norms in the two International Covenants. Accordingly, although different countries had different beliefs, traditions, and political, economic, social and legal systems, they shared almost the same ideals of social justice and freedom. None the less, in the systems of the Eastern countries the principle of equal rights and equal duties prevails. This could be said for a number of less developed countries, in particular in Africa,[83] Asia and Latin America. In the

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[77] For example, the Constitution of Portugal (see footnote 61 above), arts. 54, 64.3, 65.2, 66.2, 67, 68, 73, 74 and 79.

[78] See Universal Declaration of Human Rights, art. 1.

[79] See, for example, in paragraph 64 above, the comments of the Government of Greece. See also the Constitutions of France (para. 79 above) and of the United States of America (Peaslee, *op. cit.*, revised 3rd ed., vol. IV (1970), pp. 1195–1214).

[80] I. Szabo and others, *Socialist Concept of Human Rights* (Budapest, Akadémiai Kiadó, 1966), pp. 52–61.

[81] *Ibid.*, pp. 68–81. See also, in paragraph 64 above, the comments of the Byelorussian Soviet Socialist Republic, the German Democratic Republic, Hungary, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics.

[82] American Declaration of the Rights and Duties of Man (see *Final Act of the Ninth International Conference of American States, Bogotá, Colombia, March 30–May 2, 1948* (Washington, D.C., Pan American Union, 1948), resolution XXX).

[83] See, *inter alia*, the reports of the two United Nations seminars:

systems of most of the Western European countries and others, on the other hand, the emphasis is put on the effective protection of individuals' rights. An overwhelming majority of statesmen, legislators, jurists and sociologists of the West consider that the primary role of the law is to protect individual rights, even if logically duties should in certain cases have priority.

116. Each individual should be free to develop his own personality to the full. This freedom could be restricted by the duty of the individual to enable everyone else to do the same. When articles 2 and 6 of the Universal Declaration recognize the right of the individual to be granted the dignity of a human being, they lay upon him the fundamental duty to treat others in a like manner. Here right and duty correspond exactly and require a spirit of mutual tolerance and understanding.

117. The Romans summarized the duties of the individual towards other individuals in three maxims: *Iuris praecepta sunt haec; honeste vivere, alterum non laedere, suum cuique tribuere.*[84] Human duty in its entirety can be summed up in the last of these maxims. It is not, as appears at first sight, an empty formula; it entails an attitude of tolerance and of acting and forebearing to act, it does not permit indifference. It is a positive duty requiring the individual's interest in his fellow men; the individual must help others to develop their personality, without compelling them to do so.

118. Whenever these duties and interests are nicely balanced, the scale is tipped in favour of the freedom of the individual.

H. The question of the international duties and responsibilities of the individual

119. On the international level the individual can, in our era, be transformed into a bearer of legal rights and duties, akin to his position in more traditional types of advanced communities.

120. Accordingly, within the framework of the international duties and responsibilities of the individual, which constitutes one of the most controversial and important issues of our time, the following relevant questions will also be briefly examined.

1. INTERNATIONAL RESPONSIBILITY OF THE INDIVIDUAL[85]

121. International law provides a system of rules governing the conduct of inter-State relations. International law can also offer an answer to the majority of international disputes,[86] though in some cases the dispute may not be susceptible of settlement by the application of legal rules.[87]

122. According to traditional positivist doctrine, since the law of nations is based on the common consent of individual States, and not of individual human beings, States are solely and exclusively the subjects of international law. This means that international law is mainly a law of the international conduct of States, and not of their citizens. In this view an individual human being is never directly a subject of international law.[88] But what is the real position of the individual in international law, if he is not subject thereof? The answer can only be that he is an object of international law.

123. These statements are a summary of so-called traditional positivist doctrine of international law with regard to the position of the individual in international law. To mention the possibility that entities other than States, least of all individual human beings, could be direct subjects of international law with rights and obligations of their own, was to expose oneself to the reproach of being out-of-date.

124. The private individual had, according to positivist doctrine, rights and obligations within his own country or within some other country in which he happened to be living. There he could sue and be sued. There he could commit crimes and be punished. This could be done according to provisions of private and public national law. His relations with individuals belonging to foreign States were regulated in part by private international law,[89] but that too, was construed as part of national law.

125. In the international sphere, however, only actions of States could be prosecuted, not actions of individuals.[90] The individual could not commit international crimes. But the State which failed to restrain the individual from criminal actions could under some

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Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa, Dar es Salaam, United Republic of Tanzania, 23 October–5 November 1973 (ST/TAO/HR/48), pp. 4, 5, 21; and *Seminar on the Realization of Economic and Social Rights with Particular Reference to Developing Countries*, Lusaka, Zambia, 23 June–4 July 1970 (ST/TAO/HR/40), pp. 6 and 18.

[84] "These are the precepts of the law: to live honestly, to hurt no one and to give to every man his own" (Justinian).

[85] See H. Lauterpacht, *International Law and Human Rights* (Hamden, Conn., Archon Books, 1968), p. 43. On the question of individual criminal responsibility, see G. O. W. Mueller and E. M. Wise, *International Criminal Law* (London, Sweet and Maxwell, 1965), pp. 621–622. See also article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.

[86] See David Davies Memorial Institute of International Studies, *International Disputes: The Legal Aspects* (London, Europa Publications, 1972).

[87] See D. W. Greig, *International Law* (London, Butterworths, 1970), p. 1.

[88] L. Oppenheim, *International Law: A Treatise*, Vol. I, *Peace*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1955), para. 13. See also above, Introduction, paras. 2–9.

[89] K. Strupp, *Grundzüge des positiven Völkerrechts* (Bonn, L. Röhrscheid, 1928), p. 13.

[90] H. Triepel, "Les rapports entre le droit interne et le droit international", *Recueil des cours de l'Académie de droit international de La Haye*, 1923–I (Paris, Hachette, 1925), pp. 77–118. This also seems to be the position taken by the Permanent Court of International Justice and still maintained by the International Court of Justice. In the Nottebohm Case (Liechtenstein *v* Guatemala), the Court stated: "As the Permanent Court of International Justice has said and has repeated, 'by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law' (P.C.I.J., Series A, No. 2, p. 12, and Series A, Nos. 20–21, p. 17)."

It may, however, be noted that in the Nottebohm case the main problem before the Court was to determine whether the "factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close . . . that it is possible to regard the nationality conferred upon him as real and effective". The Court

(Continued on next page.)

circumstances be held responsible for damages caused. The sphere of application of international law was thus thought of as entirely separate from that of national law. It differed from the latter in its sources, subjects and substantive rules. Pure positivist doctrine was at the same time also in principle a dualist doctrine.[91]

126. In some circumstances, however, the individual is under a duty in international law, either conventional or customary, to carry out or to refrain from carrying out certain acts. The offence of piracy and violations of laws and customs of war are often referred to as examples in support of the theory that the individual is a subject of international law. In particular, the offence of piracy has been traditionally regarded as a crime against international law which is punishable in any State in which the offender is seized. Individuals who are members of the armed forces of belligerent States are criminally liable for violations of the international law of war and may be punished by other belligerents. In these cases the sanction is imposed upon individuals committing offences not by any international procedure but only by exercise of the domestic jurisdiction of the State having custody of them.

127. The indictment of the German Emperor, Wilhelm II, in the Peace Treaty of Versailles following the First World War was the first step towards a wider concept of international responsibility. He was arraigned not as being responsible for the war crimes committed on orders by members of the German forces, but "for a supreme offence against international morality and the sanctity of treaties". In fact the Government of the Netherlands refused the request for the surrender of the Emperor, who had already been granted asylum in that country. No trial therefore took place.[92]

128. On 8 August 1945 an agreement was signed in London by the Governments of France, the Soviet Union, the United Kingdom of Great Britain and Northern Ireland and the United States of America[93] which made provision for the prosecution and punishment of the major war criminals of the European Axis Powers whose offences had no particular geographical location. According to the Charter of the International Military Tribunal, annexed to the agreement, the jurisdiction of the Tribunal extended to individual responsibility for crimes against peace, war crimes and crimes against humanity, whether or not they violated the domestic law of the country in which they were perpetrated.

129. On the basis of the aforementioned international instruments, on 30 September 1946 the Nuremberg Tribunal delivered its judgement in which the concept of individual responsibility was recognized. This judgement shook the foundations of traditional positivist doctrine, at least with respect to the question of an individual's capacity to commit crimes against international law.

130. It was submitted by the defendants that international law was connected with the actions of sovereign States and provided no punishment for individuals; and further, that where the act in question was an act of the State, those who carried it out were not personally responsible but were protected by the doctrine of the sovereignty of the State. Both these submissions were rejected. The Tribunal made the following statement: "That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[94]

131. Two world wars took place between the time the statement referred to in paragraph 122 above was made and the date the judgement of the International Military Tribunal in Nuremberg was delivered. Fundamental reforms and great changes took place in the political, ideological, cultural, social and economic structure of the world community. In the science of international law, too, a great development took place. The aim of this development was to win for the individual human being a recognition in the system of international law as an independent jural entity. He would not only be liable as an individual for criminal action, but he would also have rights independently of the State or States under whose jurisdiction he lived. He would be capable of asserting those rights, if necessary, directly against States other than his own without having to use his own as an intermediary. Finally, he would be able to appeal directly to some international agency above the States for protection and administration of justice, thus gaining international protection against his own State. The aim of this movement was to make international law applicable *ex proprio vigore* to individuals directly, and not only through the intermediary activity of States.[95]

(Footnote 90 continued.)

observed, *inter alia*, that while "international law leaves it to each State to lay down the rules governing the grant of its own nationality"—therefore, these rules represent municipal legislation—the legislation and administration of these rules in applying them to individual subjects, nevertheless, "by its very nature affects international relations". Hence, "international relations" in this sense would consist not only of inter-State intercourse but also of relations between individuals and States. The non-existence of such "close" relations between Nottebohm and Liechtenstein was also the basis for the Court's refusal to admit Liechtenstein's right to "extend its protection to Nottebohm". *Nottebohm Case* (*second phase*) *Judgement of April 6th, 1955*: *I.C.J. Reports 1955*, p. 4. See also *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J. Series B, No. 15*; H. W. Briggs, *The Law of Nations*: *Cases, Documents and Notes* 2nd ed. (London, Stevens, 1953), pp. 879-882.

[91] H. Lauterpacht, "Règles générales du droit de la paix", *Recueil des Cours de l'Académie de droit international de La Haye*, 1937–IV (Paris, Sirey, 1938), pp. 129–148.

[92] See A. de Lapradelle and F. Larnaude, "Examen de la responsabilité pénale de l'Empereur Guillaume II d'Allemagne", *Journal du droit international* (Paris) [Clunet], vol. 46 (1919), pp. 131–159. See also L. Oppenheim, *International Law*: *A Treatise*, vol. II, *Disputes, War and Neutrality* 7th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1952), pp. 569–570, footnote 3.

[93] United Nations, *Treaty Series*, vol. 82, p. 279.

[94] Judgement given on 1 October 1946 by the International Military Tribunal at Nuremberg, Transcript of Proceedings, p. 16 878. H. Lauterpacht, *International Law and Human Rights* (London, Stevens, 1950) p. 6. See also above, Introduction, footnote 38; and para. 147 below. On the law of the Nuremberg trial, see, in particular, Q. Wright, "The law of the Nuremberg trial", in Mueller and Wise, *op. cit.*, pp. 239–289.

[95] N. Politis, *Les nouvelles tendances du droit international* (Paris, Hachette, 1927), chap. II; Q. Wright, *Contemporary International Law*: *A Balance Sheet* (New York, Doubleday, 1955), pp. 19 ff. See also paras. 155–162 below.

132. The trial of Japanese major war criminals was conducted upon the same principles. The Supreme Commander for the Allied Powers in the Far East issued a special proclamation on 19 January 1946 establishing the International Military Tribunal for the Far East, for the trial and punishment of Far Eastern war criminals who, as individuals or as members of organizations, were charged with offences against peace.[96] The jurisdiction of this tribunal at Tokyo was similar to that of the Nuremberg Tribunal, and its judgement, which was delivered on 12 November 1948, was based upon the principles contained in the judgement of the Nuremberg Tribunal.[97]

2. CRIMES AGAINST PEACE, WAR CRIMES, GENOCIDE AND CRIMES AGAINST HUMANITY

133. The controversy as to whether the trials of war criminals after the Second World War were an *ex post facto* application of alleged principles of doubtful validity and a violation of the fundamental principle of *nullum crimen sine lege*[98] seems to be of no particular importance in view of the fact that the significant concept of direct responsibility of the individual under international law for certain crimes was affirmed by common approval of the world community. The basic principles sustained by the Nuremberg and Tokyo trials were confirmed by General Assembly resolution 95 (I) of 11 December 1946.[99]

134. Further, the General Assembly declared that genocide was a crime under international law for which the perpetrators, whether they were statesmen, public officials or private individuals, were punishable.[100] The Convention on the Prevention and Punishment of the Crime of Genocide is now in force. The contracting parties declare in this Convention that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to punish.[101] It is laid down that those who are guilty of genocide must be punished whether they are constitutionally responsible rulers, public officials or private individuals. In spite of certain practical difficulties and obstacles relating to the creation of an international penal tribunal whose jurisdiction would be recognized by the contracting parties concerned, it is of great importance that genocide is now defined as a crime by individuals under international law and that its suppression is being seriously considered by the United Nations.

135. Various other acts, including acts of aggression,[102] which were crimes under international law were also defined as offences against the peace and security of mankind.

136. Further, under the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, international criminal responsibility applies to individuals, members of organizations and institutions and representatives of States whenever they commit or are involved in the commission of the crime of *apartheid*. The States parties to the Convention declare that *apartheid* is a crime against humanity and that inhuman acts resulting from the policies and practices of *apartheid*, etc., are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

3. REASONS FOR THE CURRENT INTEREST IN THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW

137. The vital concern for human rights and their protection by international law voiced in political as well as in scientific literature is mainly based on humanitarian principles. But, independently of this interest, increased international intercourse provides more and more cases that require regulation by international law and that can only with difficulty be subsumed under traditional positivist doctrine, which assumes that only States are subjects of international law. These difficulties arose for the reason that individuals were involved in ways that did not necessarily concern their States. The problems of statelessness and of refugees constitute typical examples.[103] These problems were almost unknown before the First World War. They gained comparatively minor importance after that war but assumed great dimensions after the Second World War.

138. The positivist formula that States are subjects and individuals are objects of international law does not correspond any longer to the present state of affairs. In reality, therefore, an international law of wider scope is necessary in order to correspond to important new needs.

139. A possible way to meet this demand, even to some extent, is to redefine and expand the concept of international law and to add the individual to the subjects of that law.[104] This was the approach proposed by certain writers in the period between the two world wars.[105]

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[96] R. Dennett and R. K. Turner, eds. *Documents on American Foreign Relations* (Princeton University Press, 1948), vol. VIII (July 1, 1945–December 31, 1946), p. 352.

[97] United States, Naval War College, *International Law Documents, 1948–49* (Washington, D.C., United States Government Printing Office, 1950), vol. XLVI, pp. 71–107.

[98] See, in this connection, G. Brand, "The development of the international law of war", *Tulane Law Review*, vol. XXV, No. 2 (February 1951), pp. 187, 193 and 194. See also above, Introduction, paras. 52–56.

[99] See above, Introduction, footnote 28; and paras 128–130. On the formulation of the principles of international law which were recognized in the Charter of the Nuremberg Tribunal, see "Formulation of the Nürnburg principles: report by J. Spiropoulos" (A/CN.4/22), 12 April 1950. See also Mueller and Wise, *op. cit.*, pp. 280–289.

[100] General Assembly resolution 96 (I) of 11 December 1946.

[101] Convention on the Prevention and Punishment of the Crime of Genocide, art. I; and see above, Introduction, paras. 55–56.

[102] For the definition of aggression, see General Assembly resolution 3314 (XXIX) of 14 December 1974.

[103] See above, Introduction, paras. 86–89 and 91–114.

[104] P. Jessup, *A Modern Law of Nations* (New York, Macmillan, 1948).

[105] See, among others, J. Spiropoulos, "L'individu et le droit international", *Recueil des cours de l'Académie de droit international de La Haye*, 1929–V (Paris, Hachette, 1951), pp. 195–266. On the status of the individual in international law, see, in particular, J. Andrassy, "L'individu en droit international humanitaire", *Festschrift für Jean Spiropoulos* (Bonn, 1957); A. de Lapradelle, "La place de l'homme dans la construction du droit international", in G. W. Keeton and G. Schwarzenberger, eds., *Current Legal Problems* (London, Stevens), vol. I (1948) pp. 140–151; G. Manner, "The object theory of the individual in international law", *American*

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140. The old theories of natural law, though manifold and sometimes contradictory in details, proceeded from a common basis, namely, the fundamental premise that law must be in rational conformity with the nature of man. The main idea which underlines the variety and apparent diversity of the applications of natural law is doubtless that of conformity with the nature of man as a rational and social being.

141. Grotius built his treatises *De jure belli ac pacis* and *De jure praedae commentarius* mainly on the following fundamental concepts: emphasis upon justice and morality as the bases of positive law; attribution of international rights and duties to individuals considered apart from their States; and the realization that man must show forbearance to man "because we are born for a life of fellowship in a family of nations".[106]

142. If the individual human being and his nature are taken as the starting-point, then the rights and duties or obligations of man under international law receive a foundation independent of the arbitrary will of States.

143. The question of the position of the individual in international law is thus connected with the natural law existing objectively above the will of States and giving a foundation to positive international law.[107]

144. The problem of co-ordination of the individual human being with the society in which he is living is the perennial problem of social engineering, the ultimate real task of all law. The thinkers and writers on natural law started with the individual as the basic criterion and proceeded from there toward the solution of all social problems. The positivist doctrine of dualism took the State and its will as the basic criterion. It thus substituted for the "universal and permanently fixed" point of the "individual as a given real being" the rather transitory and historically conditioned phenomenon of the nation-State.

4. Some considerations on the international personality of the individual at the present time

145. Legal personality is primarily an acknowledgement that an entity is capable of exercising certain rights and being subject to certain duties on its own account under a particular system of law. In municipal systems, the individual human being is the typical "person" of the law, but certain other entities, such as public corporations, are granted a personality distinct from the individuals who create them, and can enter into legal transactions in their own name and on their own account.

146. Under international law, the State is the typical "legal person"[108] and other entities may be considered as the "subjects" of international law in so far as they can enter into legal relations on the international plane.

147. Before the creation of the United Nations, as has been repeatedly mentioned, the traditional view was that only States are subjects of international law.[109]

148. Since 1945 it has become obvious that international law is no longer centred exclusively on the rights and duties of States but has recognized the independent existence of a variety of international institutions and, in a number of situations, has imposed obligations on, and granted rights to, individuals.

149. The consequence of this approach has been the widespread acceptance of the view that international organizations and other non-State entities and individuals are "persons" of the international legal system.

150. International relations are the concern of the principal actors on the international scene, and any definition of international personality should distinguish the position of principal actors from the position of those whom international law affects only in a subsidiary capacity. The brief statement that an international person is an entity having the power of independent action on the international plane has the obvious advantage of including not only sovereign States but also communities like "protected States", which lack some attributes of statehood, such as complete independence, but which, however, are considered as endowed with their own separate identity. Also, the statement serves to distinguish between, on the one hand, international institutions which, even if their constitutional origins were "derivative" from the will of the States which created them, have attained an independent existence no longer legally subject to the consent of any particular State or group of States; and, on the other hand, what is most important, various entities of an international character and individuals, which do not have the power of independent action on the international plane, except in so far as the individual may from time to time have been granted the limited right to prosecute claims directly against States before some constituted arbitral tribunal.

151. There is a wealth of juristic literature which has derived international personality for individuals from various treaties for the protection of minorities; from the imposition of criminal responsibility on individuals for the breach of rules of international law relating to piracy, the slave trade, war crimes and crimes against humanity; from the Genocide Convention; from the European Convention on Human Rights; from the American Declaration of the Rights and Duties of Man, 1948, and the American Convention on Human Rights, 1969; from the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights, and other relevant United Nations instruments.

152. However, the fact that rules of international law apply to the individual does not necessarily mean that the individual is a "person" of international law unless "international personality" is given a definition sufficiently wide to include him.

153. The appearance of treaty rules recognizing the rights of individuals directly destroyed the logical foundation of the "object" principle, but the result was not the acceptance by publicists of the individual as a

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(Footnote 105 continued.)

Journal of International Law, vol. 46 (July 1952); and G. Tenekides, *L'individu dans l'ordre juridique international* (Paris, Pedone, 1933).

[106] Grotius, *De jure praedae commentarius*.

[107] H. Lauterpacht, *International Law and Human Rights* (London, Stevens, 1950), pp. 9, 70, 74.

[108] See above, Introduction, paras. 2 and 3; and paras. 121–125.

[109] For a further analysis of this question, see paras. 121–125 above.

"subject" of international law.[110] Instead of an "object" he became a "beneficiary" of its rules. Nevertheless, even in this modified approach, theory fell out of step with reality. As already mentioned,[111] in the war crimes trials held after the Second World War, the principle of individual responsibility for breach of international obligations was given extended application. In rejecting the defendants' contention that it was the State alone which could be liable for acts contrary to alleged rules of international law, the Nuremberg Tribunal made the following statement: "That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[112]

154. The legality of the Nuremberg judgement cannot be challenged; it was securely founded on General Assembly resolution 95 (I) of 11 December 1946.[113]

155. At the present stage in the development of international law, individuals lack procedural capacity to lay their claims before international courts or tribunals[114] and such claims can be entertained only at the instance of the State of which the individual is a national or in certain circumstances by the international institution of which he is a servant.

156. A characteristic trend of the modern development of international law is the granting of procedural capacity to the individual for certain well-defined rights. Such a procedure developed under the League of Nations in relation to the protection of the inhabitants of the mandated territories. Although the Covenant itself contained no express provisions on the point, the inhabitants of the mandated territories were held to be entitled to address petitions to the Permanent Mandates Commission through the Mandatory Government concerned. The Charter of the United Nations contains, in connection with the trusteeship system, a specific provision regarding petitions. Article 87 provides that the General Assembly and, under its authority, the Trusteeship Council may accept petitions from Trust Territories and examine them in consultation with the administering authority. The system adopted by the United Nations is more advanced than the League of Nations system of petitions, especially in that inhabitants of Trust Territories may present petitions to the Secretary-General without the prior approval of the administering authority.[115]

157. Another notable example of procedure relating to individual applications is provided by article 25 of the European Convention on Human Rights. The individual, under certain conditions and within the territorial scope of the Convention, is granted the right to petition the Commission established by the Convention to look into alleged violations of the rights safeguarded by the Convention.[116] Nevertheless, it remains doubtful whether this right of petition greatly strengthens the argument that the individual should be regarded as endowed with a measure of international personality. The function of the Commission is essentially that of conciliation, so that even if the allegations made by the petitioner are accepted, the most that the Commission can do is to report its findings together with any proposals it may care to make to the State concerned and to the Committee of Ministers of the Council of Europe. It is up to the Commission or the State concerned to refer the case to the European Court of Human Rights. There is no right allowing an individual to initiate proceedings before the Court. Any action to be taken on the recommendation of the Commission or following a decision of the Court is entirely a matter for the Committee of Ministers.

158. A correlative approach to the granting of procedural capacity to individuals to submit communications to an international organ is provided for by article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.[117]

159. Mention should be made of the procedure established by Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970. Under this resolution the Sub-Commission on Prevention of Discrimination and Protection of Minorities was authorized to establish a working group to consider communications

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[110] For a comprehensive analysis relating to the subjects of international law and the new tendencies, see K. T. Eustathiades, "Les sujets du droit international et la responsabilité internationale: nouvelles tendances" in *Etudes de droit international 1929–1959* (Athens, 1959), vol. III, pp. 5–229.

[111] See paras. 128–132 above. See also Brand, *loc. cit.*, pp. 199 and 201.

[112] See above, para. 130 and note 94. See also Introduction, paras. 52 and 53.

[113] See also General Assembly resolution 177 (II) of 21 November 1947.

[114] Nevertheless, article 25 of the American Convention on Human Rights provides for the right of everyone to judicial protection, as follows:

"*Article 25. Right to judicial protection*

"1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

"2. The States Parties undertake:

"(*a*) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

"(*b*) to develop the possibilities of judicial remedy; and

"(*c*) to ensure that the competent authorities shall enforce such remedies when granted."

The Convention was signed at San José, Costa Rica, on 22 November 1969 and entered into force on 18 July 1978 (see above, Introduction, footnote 75). See T. Buergenthal, "The American Convention on Human Rights: an illusion of progress", in *Miscellanea W. J. Ganshof van der Meersch* (Brussels, Bruylant, 1972), vol. I, pp. 385–396. See also A. P. Schreiber, *The Inter-American Commission on Human Rights* (Leiden, Sijthoff, 1970), pp. 9 ff.

[115] M. Sorensen, ed., *Manual of Public International Law* (London, Macmillan, 1968), p. 513. Concerning the participation of individuals in international judicial procedures, see G. Sperduti, "L'individu et le droit international", *Recueil des cours de l'Académie de droit international de La Haye*, 1956–II (Leiden, Sijthoff, 1957), pp. 729–849.

[116] J. E. S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford, Clarendon Press, 1969), pp. 258–325; F. G. Jacobs, *The European Convention on Human Rights* (Oxford, Clarendon Press, 1975), p. 225 ff.

[117] See *United Nations Action in the Field of Human Rights* (United Nations publication, Sales No. E.74.XIV.2), p. 37.

relating to violations of human rights and fundamental freedoms.[118]

160. Under the present United Nations practice, petitions can also be submitted by individuals who are nationals of dependent territories, and by nationals of South Africa who are victims of *apartheid*. The former are examined by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (the Committee of 24) and the latter by the Special Committee on the Policies of *Apartheid* of the Government of the Republic of South Africa.[119]

161. Further, the ILO can accept representations by an industrial association of employers or of workers that a member State has failed to secure the effective observance within its jurisdiction of any convention to which it is a party.

162. The most significant model of the creation by States of a quasi-judicial process at the universal level, recognizing the prosecution of claims directly by individuals against States, is the procedure of individual petitions[120] provided by the Optional Protocol to the International Covenant on Civil and Political Rights.[121]

163. The issue of the international character of national liberation movements[122] is one of the difficult and, to some extent, controversial questions of present international life with which international law is concerned. The role of these liberation movements is on the increase and has significant impact on the whole structure of international law.

164. The status of wars of national liberation[123] in contemporary international law depends on their legal qualification as international conflicts or as conflicts not of an international character.

165. The traditional legal view of wars of national liberation is that they constitute a category of internal wars and as such are not subject to international legal regulation. This view has gradually been changed, in particular since the adoption of the Charter of the United Nations and the relevant international instruments relating to the right of self-determination[124]

166. In Soviet legal literature, a number of leading writers[125] have paid particular attention to this legal and humanitarian problem.

167. The prevailing Soviet view is that nations could be recognized as subjects of international law if such nations have organized governments or are waging wars for their formation. According to this view, it is necessary to recognize the international personality of "nations and peoples defending their independence, forming their organs of resistance, with an allotment of functions of public power, but which have not yet formed themselves into governments as a result of counter-action by the powers that continue to pretend on the preservation of their sovereignty and rule over such nations and peoples".[126] All the Soviet authors based their aforementioned stand on the basic point that the principle of self-determination has attained the status of an international legal right.

168. The adoption of the Charter of the United Nations and other international instruments and, in particular, the entry into force of the International Covenants have decisively influenced the status of the national liberation movements in general. Article 1, common to both International Covenants, provides, *expressis verbis*, that: "All people have the right of

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[118] See Daes, *loc. cit.*, pp. 66–69; and A. Cassese, "The new United Nations procedure for handling gross violations of human rights", *La Comunità Internazionale* (Rome), vol. XXX, Nos. 1–2 (1975), pp. 49 ff.

[119] See *United Nations Action in the Field of Human Rights* (United Nations publication, Sales No. E.74.XIV.2), pp. 149, 177 and 205.

[120] See R. Cassin, "L'homme, sujet de droit international et la protection des droits de l'homme dans la société universelle", in *La technique et les principes du droit public : Etudes en l'honneur de G. Scelle* (Paris, Librairie générale de droit et de jurisprudence, 1950), pp. 84–85 and 90–91; F. Capotorti, "The international measures of implementation included in the Covenants on Human Rights", *International Protection of Human Rights, Proceedings of the Seventh Nobel Symposium* (Uppsala, Almqvist and Wiksells, 1968), pp. 131 ff. See also *United Nations Action in the Field of Human Rights* (United Nations publication, Sales No. E.74.XIV.2), p. 23; M. E. Tardu, "The protocol to the United Nations Covenant on Civil and Political Rights and the inter-American system: a study of co-existing petition procedures", *American Journal of International Law*, vol. 70, No. 4 (October 1976), pp. 778–800; M. Prasad, "The role of non-governmental organizations in the new United Nations procedures for human rights complaints", *Denver Journal of International Law and Policy*, vol. 5 (1975), pp. 441–462. See also above, Introduction footnote 26.

[121] Mr. Rossides (Cyprus), stressing the importance of the adoption by the General Assembly of the International Convenants on Human Rights, declared, *inter alia*, that "man is not only an object of international compassion, but the subject of international right; . . . and that the human person has the right to seek redress for wrongs committed against him by his own Government by petitioning an international body duly constituted for that purpose". (*Official Records of the General Assembly, Twenty-first Session, Plenary Meetings*, 1495th meeting, para. 173.) See also above, Introduction, paras. 47–49.

[122] i.e., nations and peoples who are fighting to set up independent and sovereign States of their own. See, *inter alia*, C. Chaumont, "La recherche d'un critère pour l'intégration de la guérilla au droit international humanitaire", in *Mélanges offerts à Charles Rousseau : La communauté internationale* (Paris, Pedone, 1974), pp. 42–61.

[123] Wars of national liberation constitute a category of conflict which has gained great importance since the Second World War. These are "conflicts which arise from the struggles of people under colonial and foreign rule for liberation and self-determination". See, among others, G. Abi-Saab, "Wars of national liberation and the laws of war" in *Annales d'études internationales*, vol. III (1972), pp. 93–117; H. Meyrowitz, "Le statut des guérillas dans le droit international", *Journal du droit international* (Paris), 1973, No. 4, pp. 875–923; N. Ronzitti, *Le guerre di liberazione nazionale e il diritto internazionale* (Pisa, Università, Istituto Giuridico, 1974), pp. 108–206; B. Boina "The liberation struggle on the Comoro Islands", *Review of International Affairs* (Belgrade), 5–20 February 1972, pp. 13–15. See also A. Cristescu, *The Right to Self-Determination; Historical and Current Development on the Basis of United Nations Instruments* (United Nations publication, Sales No. E.80.XIV.3); H. Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions* (United Nations publication, Sales No. E.79.XIV.5); and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970).

[124] Abi-Saab, *loc. cit.*, pp. 94–95.

[125] See C. N. Okeke, *Controversial Subjects of Contemporary International Law* (Rotterdam University Press, 1974), which, at p. 121, contains a quotation from an article by S. B. Krylov and V. B. Durdenevsky to the effect that "in well-known stages of the fight for independence, nations may become subjects of international law" and another quotation from G. I. Tunkin in which emphasis is laid on the fact that "nations fighting for independence and the formation of their own governments should be counted as subjects of international law".

[126] L. A. Modzhorian, as cited in Okeke, *op. cit.*, pp. 121–122.

self-determination". This provision constitutes the legal basis of the struggle of national liberation movements and of their protection. The right of peoples to self-determination has been affirmed and accepted as a legal right by the world community. The right of peoples to self-determination has been affirmed by the General Assembly and the Security Council in various resolutions.[127] For instance, at its twenty-ninth session, in 1974, the General Assembly invited the Palestine Liberation Organization, as the representative of the Palestinian people, to participate in its deliberations on the question of Palestine in plenary meetings (resolution 3210 (XXIX) of 14 October 1974). In addition, the General Assembly reaffirmed, in another resolution, the inalienable rights of the Palestinian people, notably its rights to self-determination without external interference and to national independence and sovereignty (resolution 3236 (XXIX) of 22 November 1974). Among other conferences in which the national liberation movements participated, reference should be made to the first session of the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts. It is significant that that world conference decided to invite those national liberation movements which were recognized by the regional intergovernmental organizations concerned to participate fully in the deliberations of the Conference and its main committees. However, the Conference decided that only States would be entitled to vote.[128]

169. In the foregoing paragraphs an attempt has been made to examine briefly the question of the international personality of national liberation movements. The basic conclusion is that wars of national liberation are international conflicts and as such are subject to the international law of war or *jus in bello* in its entirety.

170. Finally, it should be emphasized that the international personality of the individual is still at the whim of each State. Even the European Convention on Human Rights allows States parties to the Convention the right of denunciation.[129] This denunciation is the equivalent of the withdrawal of international rights from all persons within the territory of the State concerned.

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[127] See the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and Gros Espiell, *op. cit.*, both mentioned in footnote 123 above.

[128] See "First session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: report of the Secretary-General" (A/9669), para. 15.

[129] European Convention on Human Rights, art. 65. United Nations, *Treaty Series*, vol. 213, p. 221.

Chapter II

CONCLUSIONS

A. General observations

171. The diverse traditions and beliefs, the political, economic, social and legal systems of nations and countries and the divisions of the world give different meanings and degrees of importance to such concepts or terms as "freedom under law", "personal freedom", "fundamental or basic freedoms", "civil and political rights", "economic and social rights", "duties of the individual or the citizen", "responsibilities of the individual towards the community", "community", "morality", "public order", "general welfare", "democratic society", etc.

172. Efforts are, however, made at various points throughout the study to analyse the aforementioned concepts and terms, among others, and to give them a meaning and significance for the protection of the individual which could be accepted by almost all States Members of the United Nations.

173. The following is the concluding summary of the Special Rapporteur.

B. The legal significance, impact and influence of the Universal Declaration of Human Rights

174. The Universal Declaration of Human Rights is generally regarded, in its own words, as "a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction".[130]

175. Thus, it is an expression of ideals which, as one of the pioneers in the field of human rights puts it, "in the fullness of time, ought to become principles of law generally recognized and acted upon by the States Members of the United Nations".[131] It has been argued that this is so because the terms of the Universal Declaration are vague, that it neither contains definite recommendations to Member States nor provisions concerning international legal remedies for violation of human rights,[132] and above all, that the overwhelming majority of Members regard the Universal Declaration as creating no legal obligations.[133]

176. In the course of the final discussion of the Universal Declaration before the General Assembly, some delegations expressed the view that the Universal Declaration is an interpretation of the Charter of the United Nations,[134] that it embodies customary international law or general principles of law,[135] that its legal significance derives from the fact that it is binding on the organs of the United Nations, and that its adoption meant that human rights were of international concern.[136]

177. On the other hand, the view was expressed that the Universal Declaration does not create obligations for Member States and the main reason for that is the fact that the language of the Declaration and the surrounding circumstances show that it was not intended to have such an effect. Moreover, the Universal Declaration does not provide any enforcement procedure in favour of the individual.

178. The legal effect of the Universal Declaration in expanding the scope of customary and conventional international law has already been recognized.

179. It is appropriate to recall in this regard the relevant views expressed in a memorandum prepared in 1962 by the Office of Legal Affairs of the United

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[130] Universal Declaration of Human Rights, eighth paragraph of the preamble.

[131] H. Lauterpacht, *International Law and Human Rights* (London, Stevens, 1950), p. 410. See, further, the comments made by E. Aroneanu, "Des dix commandements.— Déclaration universelle des droits de l'homme", *Revue de droit international, de sciences diplomatiques et politiques* (Geneva), 1960, No. 1, pp. 30–37.

[132] See, among others, O. Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (The Hague, Martinus Nijhoff, 1966), p. 189.

[133] Lauterpacht, *op. cit.*, p. 413. See also above, Introduction, paras. 44 and 45.

[134] See, for example, the views expressed by René Cassin (France) at the 92nd meeting of the General Assembly's Third Committee, on 2 October 1948 (*Official Records of the General Assembly, Third Session, Part I, Third Committee, Summary Records of Meetings*, pp. 60–63).

[135] See, for example, the comments made by the representative of Belgium at the 108th meeting of the Third Committee, on 20 October 1948 (*Official Records of the General Assembly, Third Session, Part I, Third Committee, Summary Records of Meetings*, pp. 199–200). In connection with the Islamic attitude to the Universal Declaration, see, among others, the following comments made by an Iranian author: "The Declaration of Human Rights is an international law which humanitarians the world over regard with high esteem. It was produced by one of the commissions of the United Nations and accepted by the governments that are members of that organization, of which it is a masterpiece." S. Tabandeh of Gunabad, *A Muslim Commentary on the Universal Declaration of Human Rights* (Guildford, F.J. Goulding, 1970), p. 1.

[136] See footnote 134 above. R. Higgins suggests, further, that "international concern over human-rights questions is always justified by the purely moral force of the human-rights provisions", in her book *The Development of International Law through the Political Organs of the United Nations* (London, Oxford University Press, 1963), p. 130.

Nations Secretariat and submitted to the Commission on Human Rights at its eighteenth session, in which the use of the terms "declaration" and "recommendation" was described as follows:

> 3. In United Nations practice, a "declaration" is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration of Human Rights. A recommendation is less formal.
>
> 4. Apart from the distinction just indicated, there is probably no difference between a "recommendation" and a "declaration" in United Nations practice as far as strict legal principle is concerned. A "declaration" or "recommendation" is adopted by resolution of a United Nations organ. As such it cannot be made binding upon Member States, in the sense that a treaty or convention is binding upon the parties to it, purely by the device of terming it a "declaration" rather than a "recommendation". However, in view of the greater solemnity and significance of a "declaration", it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.
>
> 5. In conclusion, it may be said that in United Nations practice, a "declaration" is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.[137]

180. The influence of the Universal Declaration on international agreements is significant.[138]

181. Resolutions of Latin American conferences[139] and the pronouncements of the Bandung conference of Asian-African States of 1955 are among a few of the endorsements of the Universal Declaration at regional and international conferences.

182. The Universal Declaration has been referred to in numerous decisions of national courts which are evidence of the practice of States. The value of referring to these judicial decisions is that, as has already been mentioned, they are part of what is regarded as State practice,[140] which is a source of international law.[141] Accordingly these decisions play a part in the development of the contemporary international law.

183. Further, the Universal Declaration as a standard of achievement is sometimes a guide to the interpretation and application of national laws. It has been relied upon as evidence of "modern law" on the protection of the basic human rights and fundamental freedoms of individuals.[142]

184. Many national constitutions incorporate the Universal Declaration in their preambles by reference.[143] The endorsement of the principles of the Universal Declaration is strongest in constitutions in whose elaboration the United Nations played an active role, such as that of Eritrea.

185. The Special Rapporteur accepts the view that the Universal Declaration was formulated on the understanding that it was the most expedient way of providing a basis for joint and separate action, by all Members of the United Nations, towards the promotion of universal respect for and observance of human rights and fundamental freedoms. It was under the basic authority of Article 55 of the Charter that the General Assembly proclaimed the Universal Declaration as "a common standard of achievement for all peoples and nations".[144]

186. The faithful observance of Articles 55 and 56 of the Charter requires Member States to consider the application of the principles of the Universal Declaration. This view is strengthened by the numerous

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[137] See the report of the Commission on Human Rights on its eighteenth session, (*Official Records of the Economic and Social Council, Thirty-fourth Session, Supplement No. 8* (E/3616/Rev. 1)), para. 105.

[138] For example, in article 1 of the special statute of Trieste annexed to a memorandum of understanding, signed at London on 5 October 1954 between Italy, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia, Italy and Yugoslavia agreed as follows: "In the administration of their respective areas the Italian and Yugoslav authorities shall act in accordance with the principles of the Universal Declaration of Human Rights . . . so that all inhabitants of the two areas without discrimination may fully enjoy the fundamental rights and freedoms laid down in the aforesaid Declaration." *Department of State Bulletin*, Vol. XXXI, No. 799 (18 October 1954), p. 558.

The European Convention on Human Rights is based largely upon the principles of the Universal Declaration. See above, Introduction, para. 115.

Under the Franco-Tunisian Conventions of 1955, Tunisia agreed to abide by the principles of the Universal Declaration. *Yearbook on Human Rights for 1955* (United Nations publication, Sales No. 1958.XIV.1), pp. 340–342.

In the preamble to the Treaty of Peace with Japan of 1951, Japan declared her intention to strive to realize the objectives of the Universal Declaration. *Yearbook on Human Rights for 1951* (United Nations publication, Sales No. 1953.XIV.2), p. 489.

Special reference to the principles of the Universal Declaration was also made in the preamble of the American Convention on Human Rights, 1969. See above, Introduction, para. 128.

Mention of the Universal Declaration was further made in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1975), which provides, in section 1(*a*) VII, that: "In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights . . ."

[139] See, for example, *Final Act of the Tenth Inter-American Conference, Caracas, Venezuela, March 1–28, 1954* (Washington, D.C., Pan American Union, 1954), resolution XXVII, "Strengthening of the system for the protection of human rights".

[140] See the report of the International Law Commission covering its second session (*Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316)), para. 54.

[141] Statute of the International Court of Justice, art. 38, para. 1 *d*. See W. Friedmann, O. L. Lissitzyn and R. C. Pugh, *Cases and Material on International Law* (St. Paul, Minn., West Publishing Co., 1969), pp. 82–84. Also, G. I. Tunkin, *Theory of International Law* (London, Allen and Unwin, 1974), pp. 184–185.

[142] See, for example, the case of *Vanderginste* v. *Sulman* (26 April 1956), in which the Court of First Instance of Courtrai, Belgium, upheld the validity of a will appointing a widow the sole legatee provided she did not remarry; this condition was, however, considered void as being contrary to public policy, a fact which the Court said was particularly stressed in article 16 of the Universal Declaration of Human Rights. *Yearbook on Human Rights for 1956* (United Nations publication, Sales No. 58.XIV.2), p. 23.

In *Fujii* v. *State of California*, a District Court of Appeals struck down a statute forbidding ownership of real property by aliens for reasons based *inter alia* on the relevant principles of the Universal Declaration (217 P. 2d. 481, 488 (1950)). *Yearbook on Human Rights for 1950* (United Nations publication, Sales No. 1952.XIV.1), p. 328.

[143] For example, almost all the constitutions of the former French territories of Africa, including Benin, Gabon and the Ivory Coast, and the national constitutions referred to in *The Impact of the Universal Declaration of Human Rights*, rev. ed (United Nations publications, Sales No. 1953.XIV.1), pp. 30–33. See also J. P. Humphrey, "The Universal Declaration of Human Rights: its history, impact and juridical character" in B. G. Ramcharan, ed., *Human Rights: Thirty Years after the Universal Declaration* (The Hague, Martinus Nijhoff, 1979), p. 29.

[144] M. Ganji, *International Protection of Human Rights* (Geneva, E. Droz, 1962), p. 165.

resolutions of United Nations organs which regard infringement of the principles of the Universal Declaration as violations of the Charter.

187. The Universal Declaration is, therefore, of a quasi-legal significance as distinct from being the source and origin of legal rights and duties.[145]

188. Accordingly, the contents of the Universal Declaration are being made a part of the thinking and belief of those who aspire to the full enjoyment of the rights it sets forth.

C. The legal significance of the fifth preambular paragraph of the International Covenants on Human Rights

189. The fifth preambular paragraph of the International Covenants reads: "*Realizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant".

190. The Special Rapporteur is of the opinion that such provisions in a preamble are not without legal significance. It is an established rule of interpretation that every word and part of a treaty is presumed to have a meaning and to produce some legal effects.[146] It is the normal function of the preamble to give expression to the objectives of the treaty. Moreover, in some cases, the preamble, in addition to being an aid to interpretation, is a direct source of legal obligations not set forth in the operative part.

191. The meaning of the term "context" of a treaty is defined in article 31, paragraph 2, of the Vienna Convention on the Law of the Treaties[147] as including the preamble as well as those documents that form annexes to the treaty in question.[148]

192. Accordingly, the provision contained in the fifth preambular paragraph of the International Covenants, which are legally binding instruments, serves as an introduction and constitutes an aid for interpretation of the articles that follow. It reminds the individual explicitly that, first, he has duties to other individuals and to the community to which he belongs and that, secondly, he is under a responsibility to strive for the promotion and observance of human rights.

193. Thus, while the International Covenants were intended to protect human rights and personal freedoms, it was also thought appropriate to recall the above-mentioned two distinct facts, i.e. that the individual has duties to other individuals and to the community and a responsibility to strive for the promotion and observance of the rights recognized in the International Covenants.

194. The reference to the duties of the individual to other individuals and to the community and his responsibility to strive for the promotion and observance of human rights is vague and abstract.[149]

195. It is an indisputable fact that the International Covenants are concerned with the obligations of States to individuals; however, as States are the sum of individuals, the individual must also co-operate if he wishes the International Covenants to be implemented.[150]

D. The question of the individual as a subject of international duties and responsibilities

196. The controversy concerning the position of the individual in international law[151] is still going on, at present probably with more intensity.

197. The views expressed and the attitudes adopted on central topics such as the correlation between national and international laws and the position of the individual in international law are at present far more complicated than ever before.

198. Examination of some substantive international rules, relevant international conventions, the Charters of the International Military Tribunals of Nuremberg and the Far East, the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights and several cases and facts relating to the problem of the international personality of the individual as outlined in the present study has shown that the individual has some capacity directly under international law. It could be said to be a restricted capacity differing from that of any political entity.

199. All individuals may not have the same capacity for rights under international law; stateless persons, for example, may have less capacity than nationals.

200. It should be noted, however, that the individual is still deprived of any direct procedural capacity to appear before international courts[152] and tribunals in

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[145] See also Asamoah, *op. cit.*, p. 190. Also notable are the relevant comments by C. W. Jenks, *Human Rights and International Labour Standards*, (London, Stevens, 1960), pp. 13–14.

[146] E. Schwelb, "International conventions on human rights", *The International and Comparative Law Quarterly*, vol. 9, 1960, p. 673.

[147] "*Article 31. General rule of interpretation.*

". . .

"2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: . . ."

(*Official Records of the United Nations Conference on the Law of Treaties. Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 293.) See I. M. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press, 1973), p. 71. The Vienna Convention on the Law of Treaties came into force on 27 January 1980.

[148] See T. O. Elias, *The Modern Law of Treaties* (Dobbs Ferry, N.Y., Oceana Publications, 1974), pp. 74 and 75, and *New Horizons in International Law* (Alphen a.d. Rijn, Sijthoff and Noordhoff, 1979), p. 43. In connection with the "Techniques" of interpretation, see, among others, G. Schwarzenberger and E.D. Brown, *A Manual of International Law*, 6th ed. (Milton, England, Professional Books, 1976), pp. 133–135.

[149] The final text of the fifth preambular paragraph of the International Covenants was elaborated and submitted by the delegations of Australia and Sweden to the Commission on Human Rights at its eighth session. It was an important amendment to the draft preamble of the two International Covenants presented by the delegation of the United States of America. See paras. 60–63 above.

[150] See para. 61 above.

[151] See Introduction, para. 52; and paras. 121–132 and 145–170 above. See also D. P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol. I, pp. 106–111. M. Bothe and G. Ress accept the view that "the individual is recognized 'in principle' as a subject of international law". See their study "The comparative method and public international law" in W.E. Butler, ed., *International Law in Comparative Perspective* (Alphen a.d. Rijn, Sijthoff and Noordhoff, 1980), p. 50.

[152] The Permanent Court of International Justice in the Mavrommatis case said that only when the national State takes up the complaint of its subject does the matter enter "the domain of

defence of his rights, and the international law governing responsibility allows him to defend his rights only through the medium of his State and subject to its consent. But this fact does not exclude the creation of this right at any moment by agreement of States.

201. No international criminal court or tribunal with jurisdiction to try and punish individuals responsible for committing crimes against peace, war crimes and crimes against humanity exists today;[153] nor does any international criminal code applicable to the individual exist.

202. Certain international rights, duties and responsibilities of individuals have become a part of international customary or conventional law.[154]

203. It is a fact that consistent patterns of gross violations of human rights are still found in many parts of the world, and there are fears that such violations will increase if the international community does not take immediate action for effective protection of the individual.

204. In almost all parts of the world, the individual nowadays lives under real threats, and in spite of the progress made in the field of human rights these threats may be very serious.

205. International organizations are constantly dealing with individuals, and though their actions, for example the receipt of communications by the Trusteeship Council or other bodies of the United Nations or of regional organizations, may not be directly productive of legal relations, at least they presume that the individual has status.

206. States are the sole full subjects of international law. The scope of the international personality of inter-State organizations and of individuals depends on the will and agreement of States, and is always revocable by them.

207. In order to approach the international personality of the individual in a valid legal manner and to explore the possibilities of employing new legal methods and ideas in an attempt to remove the obstacles which lie between the individual and international law, one has first of all to detect and define such obstacles.

208. Accordingly, the competent organs and bodies of the United Nations, its specialized agencies, the international lawyer and the national legislator should subject relevant international instruments to legal scrutiny and examine rules of international law, in order to expose and define any loopholes and defects which may obstruct or prevent the promotion, observance or enforcement of the rights of the individual and which may hinder the efforts to confer international responsibility upon him.

209. In the relevant part of this work, however, an attempt was made, through brief analysis of the existing rules of international law and comparison and assessment of various theoretical and practical questions relevant to the protection of the individual, to present the controversy which exists between eminent international lawyers concerning the position of the individual in international law and to define some of the basic obstacles that stand between the individual and international law.[155]

210. Theorists who claim international personality for individuals are few, but writers who recognize the usefulness or necessity of the international personality of the individual apart from that of the State are increasingly numerous.

211. In spite of all the set-backs suffered during attempts to secure recognition of the international personality of individuals in international law, this idea holds within itself favourable prospects for the future.

212. The impact of international law on the individual is more apparent nowadays because of recent and current developments concerning, in particular, his own effective protection within the world community and his important role in the domains of international co-operation, human rights (see Commission on Human Rights resolutions 23 (XXXV) and 23 (XXXVI)) and peace.

E. The meaning of personal freedom

213. Personal freedom means the freedom of every law-abiding individual to think what he will, say what he will and go where he will on his lawful occasions without let or hindrance from any other persons. This freedom must be matched with the peace and law of the community in which the individual lives. The freedom of the just individual is worth little to him if he can be preyed upon by murderer or thief.[156] Every individual should respect the rights and freedoms of other individuals and carry out his lawful obligations to the community.

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international law" (*Mavrommatis Palestine Concessions, Judgement No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12). See also paras. 150–162 above.

[153] In 1950, the General Assembly decided to appoint a committee of one representative each of 17 Member States to meet in Geneva on 1 August 1951 to prepare one or more preliminary draft conventions for the establishment of an international criminal court (resolution 489 (V) of 12 December 1950). The United Nations Committee on International Criminal Jurisdiction met in Geneva and prepared a "Draft Statute for an International Criminal Court". On the recommendation of the Sixth Committee, the General Assembly decided, on 5 December 1952, that a further consideration and review of the above-mentioned draft statute should be entrusted to a new committee (resolution 687 (VII)). The new committee met from 27 July to 20 August 1953, and elaborated a "Revised Draft Statute". It also recommended that the court be established through the medium of a convention drafted by an international conference convened by the General Assembly. (Report of the 1953 Committee on International Criminal Jurisdiction, *Official Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645).)

Article 1 of the revised draft statute was based on the idea that international law imposes direct international duties and responsibilities upon the individual. This article read: "There is established an International Criminal Court to try natural persons accused of crimes generally recognized under international law" (A/2645, annex). Moreover, article 25 of that draft provided that: "The Court shall be competent to judge natural persons, whether they are constitutionally responsible rulers, public officials or private individuals.

Nevertheless, no further attempt has been made to put this revised statute into practice, and there is no evidence that renewed interest in it has been shown recently.

[154] See, for example, N. Singh, "The declaration of Human Rights and customary international law", *Horizons of Freedom*, pp. 114–121.

[155] See Introduction, para. 52; and paras. 121, 170 and 196–201 above.

[156] See Sir Alfred Denning, *Freedom under the Law* (London, Stevens, 1949), p. 5.

214. Every society or State should have certain powers and the lawful means to protect all individuals and itself as a whole from those who break the laws.

215. The laws of every State should endure only so long as they are accepted by the conscience of the people.

216. So long as the individual, on the one hand, respects the rights and freedoms of other individuals and fulfils his responsibility to strive for the promotion and observance of the rights recognized in the Universal Declaration of Human Rights, the International Covenants on Human Rights and other international and national instruments on human rights, and the State, on the other hand, properly and lawfully exercises its powers, a balance is achieved which constitutes a safeguard of freedom.

217. Universally, human rights form the basis of freedom, justice and peace in the world. Human duties, on the other hand, do not have the exalted status of human rights. Powers may be abused by States, and if they are there is no tyranny like them. This leads to the state of affairs that exists in police States or dictatorial régimes.

218. Accordingly, it should once again be mentioned that a true balance must be maintained between personal freedom on the one hand and social stability in a democratic society on the other.

219. The law, which is one of the corner-stones of democracy in a State governed by law (*Etat de droit*), should protect the freedom of the individual and should be based mainly on court procedures. A law cannot always foresee the details of a rule nor its permissible exceptions. The State is compelled to place this burden upon the independent judge who must apply the law to the case that is before him. This concluding observation contains the fundamental principle that where there is any conflict between the freedom of the individual and any other rights or interests, then no matter how great or powerful such rights or interests may be, the freedom of the individual shall prevail over them.

220. These ideas are expressed in the laws of certain truly democratic States and should also find their expression in the laws of other States.

221. The ideal of the free individual does not mean that the individual is completely unrestrained and devoid of any responsibility towards his fellow human beings and the community. In certain sections of this study the individual has been referred to as "man". In this case, the concept taken is that of the Buddhists, Muslims, Stoics, Christians and others. The individual, through teaching, education and knowledge, and the proper and lawful exercise of his rights and duties, becomes a useful member of the community. This is true for the citizen too. The citizen should be aware that his is not the only will in the world, and he should be concerned, in one way or another, with bringing harmony out of the conflicting wills that exist within his community. The individual and citizen, as presented above, is essentially circumscribed by his neighbours. All members of the present world, except for certain refugees or stateless persons, are in fact citizens of different States. The issue between individuality and citizenship is important in politics, education, ethics, human relations and in particular in international and municipal law.

222. The ideal of the free man is defined in the third paragraph of the preamble of each International Covenant. This paragraph was based upon the Universal Declaration as interpreted by the General Assembly in resolution 421 E (V) and reaffirmed in resolution 543 (VI). In these resolutions the General Assembly declared that "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent", and that "when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man".

223. It is in the above-mentioned third preambular paragraph of each International Covenant that a difference in emphasis, and hence in wording, exists. Thus, in the International Covenant on Civil and Political Rights the third preambular paragraph states that "the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights", whereas in the International Covenant on Economic, Social and Cultural Rights the third preambular paragraph states that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights". These preambular paragraphs were intended to underline the unity of the two Covenants while at the same time maintaining the distinctive character of each.

F. The reference to the duties and responsibilities of the individual in the Universal Declaration of Human Rights and in the fifth preambular paragraph of the International Covenants on Human Rights

224. The Universal Declaration contains, in its article 29, paragraph 1, a provision explicitly providing for the duties of the individual. It stipulates that everyone has duties to the community. The reason for this provision is also given in the same paragraph: it is only within the community that the free and full development of the personality of the individual is possible.

225. The fifth preambular paragraph of both International Covenants contains an abstract statement which reads: ". . . the individual, having duties to other individuals and to the community to which he belongs . . ."[157]

226. The primary role of the law is to protect individual rights even if, logically, duties should have

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[157] See paras. 189 and 194 above. See also Commission on Human Rights resolution 23 (XXXVI) of 29 February 1980. The draft resolution that was later adopted as resolution 23 (XXXVI) was introduced at the 1559th meeting, on 27 February 1980, by the representative of Canada (Mr. Y. Beaulne); a summary of his statement appears in press release HR/864 of 27 February 1980, issued by the Information Service of the United Nations Office at Geneva.

priority in certain cases. Many rights carry with them corresponding duties.[158]

227. The basic difference between law and morality is that morality is conceived as a system composed of duties.[159]

228. Law is the synthesis of factors including morality. The Special Rapporteur does not believe that an antithesis between law and morality exists.

229. With these principles, pre-conditions and considerations in mind, as well as those mentioned earlier,[160] the duties and responsibilities discussed in section G below should, in conclusion, be considered as the individual's basic duties to the community.

G. Human duties and responsibilities of the individual to the community

230. It is in the Charter of the United Nations that the individual appears as bearer of fundamental human rights, duties and responsibilities. Thus, in accordance with the provisions of the Preamble[161] to the Charter, the peoples of the United Nations, determined

> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
>
> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,

implicitly recognized their duty and undertook the responsibility

> to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
>
> to promote social progress and better standards of life in larger freedom.
>
> AND FOR THESE ENDS
>
> to practice tolerance and live together in peace with one another as good neighbors, and
>
> to unite our strength to maintain international peace and security, and
>
> to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
>
> to employ international machinery for the promotion of the economic and social advancement of all peoples,

and resolve to combine their efforts to accomplish these aims.

231. The purpose of the use of the words "We the peoples of the United Nations" at the beginning of the Charter was to emphasize that the Charter was an expression of the wills of the peoples of the world.[162] However, the conclusion of the Preamble was modified to convey the idea that though the Charter purported to reflect the resolution of peoples, the actual agreement was between Governments.[163]

232. The reference in the Preamble to the Charter to faith in "fundamental human rights" and in "the dignity and worth of the human person" gives support and emphasis to the provisions of Articles 1 and 55 of the Charter in particular.

233. The emphasis of the Preamble on combining justice with respect for international obligations is in line with the authority given to the General Assembly under Article 14, implicitly rather than explicitly, to review and make recommendations with respect to the revision of international agreements in the interest of peace and justice.

1. DUTY TO RESPECT PEACE AND SECURITY

234. Among the first duties[164] of the individual should be the duty to use his strength to maintain international peace[165] and security.

235. In international society, as in national, the rule of law presupposes an overriding obligation to respect the peace and effective arrangements to restrain breaches of the peace.

236. The individual must support, by all means at his disposal, the measures taken by Governments and international and national organizations for a complete prohibition of tests of nuclear weapons, the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and the prevention of the pollution of oceans and inland waters by nuclear wastes.[166]

2. QUESTION OF THE DUTY TO REFRAIN FROM ANY PROPAGANDA FOR WAR

237. Article 20, paragraph 1, of the International Covenant on Civil and Political Rights reads: "Any

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[158] See the annotation of the text of the draft International Covenants on Human Rights, *Official Records of the General Assembly, Tenth Session, Annexes* agenda item 28 (part II), document A/2929, chap. III, para. 11.

[159] R. Marcic, "Duties and limitations upon rights", *Journal of the International Commission of Jurists* (Geneva), vol. IX, No. 1 (June 1968), p. 59.

[160] See above, Introduction, and the preceding sections of the present chapter.

[161] In connection with the legal significance of the preamble of a treaty, see paras. 189–191 above. See also the following *ad hoc* comments made by L. M. Goodrich, E. Hambro and A. P. Simons in their classic work *Charter of the United Nations: Commentary and Documents*, 3rd and rev. ed. (New York, Columbia University Press, 1969), p. 20: "A preamble is a customary part of a treaty and serves the purpose of defining in general terms the purposes which the parties have in view and the considerations that have led them to agree . . . The view of the technical committee was that all provisions of the Charter, 'being in this case indivisible as any other legal instrument, are equally valid and operative'."

[162] Goodrich, Hambro and Simons, *op. cit.*, p. 21.

[163] R. B. Russel, *A History of the United Nations Charter: The Role of the United States 1940–1945* (Washington, D.C., The Brookings Institution, 1958), pp. 913–918.

[164] An analysis of the question of the individual as a subject of international duties and responsibilities has already been presented above, in paras. 119–170 and section D above.

[165] During the discussion in the General Assembly's Third Committee on the draft resolution that was later adopted as Assembly resolution 3010 (XXVII) of 18 December 1972, an amendment relating to the addition to the objectives of International Women's Year of a reference to the obligation of women to make their contribution to the maintenance of world peace, submitted by Greece and Guatemala and introduced by Mrs. A. E. Daes (Greece), was unanimously adopted (see paragraph 2 (*c*) of the resolution, reading: "To recognize the importance of women's increasing contribution to the development of friendly relations and co-operation among States and to the strengthening of world peace"). See also "International Women's Year: report of the Working Group established to work out a draft programme of activities" (E/CN.6/588, 30 January 1974). See also the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, proclaimed by the General Assembly in resolution 2037 (XX) of 7 December 1965, in particular its principles V and VI. In connection with the duty of the individual not to commit any act which might destroy world peace, see *inter alia* the comments of the Government of Pakistan reproduced in paragraph 64 above.

[166] Declaration on Social Progress and Development, art. 27.

propaganda for war shall be prohibited by law." This provision could be interpreted as constituting an obligation first of all for States to include in their relevant legislation an explicit provision prohibiting propaganda for war. Another possible interpretation, however, is that the provision requires an appropriate prohibition by law only as and when the need to deal with propaganda for war arises in practice. In any case the individual is indirectly obliged to respect the provision of article 20, paragraph 1, of the International Covenant and to refrain from any propaganda for war.[167]

3. DUTY TO REFRAIN FROM ADVOCACY OF NATIONAL, RACIAL OR RELIGIOUS HATRED

238. A duty of the individual which derives indirectly from article 20, paragraph 2, of the International Covenant on Civil and Political Rights is to refrain from advocacy of national, racial or religious hatred that constitutes incitement to discrimination,[168] hostility or violence.

4. DUTIES TO HUMANITY

239. The individual also has duties to humanity. This conclusion is mainly derived from the law of nature.[169] Thus, natural law commands the individual not only to strive for his own preservation and perfection, but also aid his fellow men in this effort, as only in this way can each really preserve and perfect himself.

240. In the Stoic conception, the general brotherhood of all men transcends the existing national, State, religious and other boundaries which separate men. They are members of the "*civitas maxima*"[170] in the Stoic sense. Men are citizens of the universe, because of the essential qualities of the rational human nature.

241. The view of the Special Rapporteur that the individual has rights and duties to contemporary humanity and a responsibility derived therefrom is based *inter alia*, on the provisions of articles I and VI of the Convention on the Prevention and Punishment of the Crime of Genocide and articles I and III of the Convention on the Suppression and Punishment of the Crime of *Apartheid*.

5. RESPONSIBILITY FOR OBSERVANCE OF INTERNATIONAL LAW

242. The individual has a responsibility to observe the rules of international law and in particular the Charter of the United Nations, the International Covenants on Human Rights and other international instruments relating to human rights.[171] These international instruments contain a body of provisions which constitute the law common to the States parties in a common effort to protect the rights of the individual and to refer, *in abstracto*, to his responsibilities.

6. RESPONSIBILITY FOR OBSERVANCE OF INTERNATIONAL HUMANITARIAN LAW (LAW OF ARMED CONFLICT)

243. The term "humanitarian law", in this case, combines two ideas of a different character, one legal, the other moral. It is precisely the concept of a moral, and especially of a humanitarian, order which has been incorporated into the provisions of international law. Contemporary humanitarian law gained impetus from 1948 to 1950, three years which marked a decisive step in the struggle for the defence of the human person. The year 1949 saw the conclusion of the four revised and more far-reaching Geneva Conventions for the protection of the victims of war. In 1977, these Conventions were further developed and supplemented by the two Additional Protocols adopted by the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts.[172]

244. One of the characteristics of humanitarian law is that it is the result of a compromise between opposing concepts: humanity and necessity. Humanity demands that all action be for man's good. The principle of necessity stems from the nature of things. The maintenance of public order involves the use of a certain amount of force, while a state of war brings about recourse to violence. Consequently, the latter principle is obviously not one of the principles of humanitarian law. In no way does it justify war or convey the idea that war is an eternal and irremediable phenomenon. It is a statement of fact.

7. RESPONSIBILITY TO STRIVE FOR THE PROMOTION AND OBSERVANCE OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

245. This great responsibility of the individual is basically derived from the Preamble to the Charter of the United Nations, the eighth preambular paragraph of the Universal Declaration of Human Rights and the fifth preambular paragraph of the International Covenants on Human Rights[173] as well as from other international documents and national constitutions. In accordance with this provision, every individual and every organ of society, keeping the Declaration constantly in mind, shall strive by teaching and education to promote respect for the rights and freedoms contained therein, and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

246. This responsibility is further based on article

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[167] See E/CN.4/Sub.2/SR.765, para. 14.

[168] See Introduction, paras. 57–73. See also United Nations Declaration on the Elimination of All Forms of Racial Discrimination, art. 2; International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, para. 4; International Convention on the Suppression and Punishment of the Crime of *Apartheid*, arts. II and III.

[169] P. P. Remec, *The Position of the Individual in International Law, According to Grotius and Vattel* (The Hague, Martinus Nijhoff, 1960), pp. 191–192.

[170] On this question and with regard to the terms "world community", "world law" and "world order", see the critical study by G. Schwarzenberger, "*Civitas maxima?*", in *The Year Book of World Affairs, 1975* (London, Stevens, 1975), pp. 337–363.

[171] See, for example, the Preamble of the Charter, the fifth paragraph of the preamble of the International Covenants, and paras. 48–63 and 189–195 above.

[172] See the text of the Additional Protocols in document A/32/144 of 15 August 1977, annexes I and II.

[173] See Introduction, para. 44; and paras. 1 and 189–195 above. See also Commission on Human Rights resolution 23 (XXXVI).

30 of the Universal Declaration, which explicitly provides: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

247. Article 5, paragraph 1, of both International Covenants repeats and broadens the provision of article 30 of the Universal Declaration, stating:"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant."[174] Accordingly, the duty to resist violations of human rights deserves to be encouraged and supported.

8. Duty of judges of the International Court of Justice and experts of special bodies to exercise their functions with independence, impartiality and objectivity

248. If an individual is elected as a member of the International Court of Justice, he is under an obligation to exercise his function and powers with independence and impartiality and in accordance with the provisions of Articles 16, 17 and 20 of the Statute of the Court.

249. If an individual is elected as an independent expert[175] or member of one of the committees of the United Nations which have quasi-judicial functions, or of other bodies of the United Nations system, he is under an obligation to exercise his functions and powers with independence, impartiality and objectivity. The independence of the individual who is a member of a supervisory body is a guarantee for objectivity and impartiality in the exercise of quasi-judicial functions.

9. Duty to respect the general welfare

250. It is the duty of the individual to respect, recognize and give priority to the general welfare, or the public or general interest, in so far as they are compatible with the dignity of the individual. The general welfare by itself has no meaning; its purpose is to promote man's dignity and well-being.[176]

251. The general welfare is something quite different from "reason of State".[177] One of the purposes of the State is to safeguard the rights and interests of the individual human being. Man should identify himself with the community but not lose his identity in it.

252. In this connection, it should also be mentioned that in certain regions of the world, e.g. Africa, where a number of States have recently attained their independence, the pressing necessity is the satisfaction of basic social needs[178] and the promotion of the well-being and economic security of the great masses. Even in such cases a State requires a positive government with the affirmative duty to act on behalf of its citizens to assure them work, housing, education, adequate health services, and all other economic, social and cultural rights, and with a view to creating, as soon as possible, the necessary conditions—which include national legislation—for an effective protection of the civil and political rights of the individual; this is contemplated in the Universal Declaration, the International Covenants, the Declaration on Social Progress and Development and other international instruments.

253. The conduct of a less developed State[179] facing problems relating to the implementation of certain human rights[180] should in no way be inconsistent with the maintenance of the fundamental principles of the rule of law, judicial control and the protection of the human rights of all without any discrimination, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

254. The less developed countries have a good deal of leeway to make up—especially those of Africa and Asia, since institutional structures under a regional convention, such as a Court of Human Rights or even a Commission on Human Rights, have not been established there for the protection of individual freedoms.[181]

10. Question of the duty to review and to resist

255. Another concluding observation which could be made is that every individual has a duty to oppose demands of the community that are incompatible with the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Suppression and Punishment of the Crime of *Apartheid*, the international instruments relating to slavery, the Abolition of Forced Labour Convention, the Convention for the Suppression of the Traffic in

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[174] See the annotations on the text of article 5, paragraph 1, of the draft International Covenants on Human Rights, in *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (part II), doument A/2929, chap. V, paras. 55–59.

[175] N. Valticos, "The international protection of economic and social rights", in *Rechten van de mens in mundiaal en europees perspectief* (Maarssen, Netherlands, Stichting Ars Aequi, 1978), p. 174.

[176] See para. 116 above.

[177] The State is an institution in the service of man, and human rights, whatever one's views regarding their origin and nature, must be recognized and protected. *Official Records of the General Assembly, Twenty-first session, Plenary Meetings, Verbatim Records of Meetings*, vol. III, 1495th Meeting, para. 107.

[178] See K. M'Baye, "Les réalités du monde noir et les droits de l'homme", *Revue des droits de l'homme*, vol. II, No. 3 (1969), pp. 391–392.

[179] On this point, see the views expressed in the report of the *1959 Seminar on Judicial and Other Remedies against the Illegal Exercise or Abuse of Administrative Authority*, Peradeniya (Kandy), Ceylon, 4-15 May 1959 (ST/TAO/HR/4).

[180] See the report of the *Seminar on Human Rights in Developing Countries*, Dakar (Senegal), 8-22 February 1966 (ST/TAO/HR/25), paras. 16–197.

[181] In connection with the promotion of human rights and the problems and needs of Africa, see the report of the *Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa*, Dar es Salaam, United Republic of Tanzania, 23 October–5 November 1973 (ST/TAO/HR/48), paras. 17–136.

Persons and of the Exploitation of the Prostitution of Others, and other international instruments relating to the protection of human rights and fundamental freedoms or with national democratic constitutions.

256. This conclusion has been drawn from the comparative research undertaken on the basis of the replies of Governments and the study of a number of national constitutions in force. For example, article 20, paragraph 4, of the Greek Constitution[182] explicitly provides; "It is the right and the duty of the Greeks to resist by all means anyone attempting to abolish by force this constitution", and "Whosoever usurps the people's sovereignty and rights shall be prosecuted the moment lawful authority is restored".[183]

257. However, resistance to unlawful acts and measures must, in principle, not overstep the limits of the legal order which that act or measure has contravened. Everyone is under an obligation to refrain from using violence except in self-defence. Also, it is an obligation of every individual, in cases of resistance, to protect the life and the rights of others and to avoid damaging natural ecological systems which serve the public welfare.

258. This conclusion is also based on the third paragraph of the preamble of the Universal Declaration, which explicitly stipulates: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

11. Question of obedience to the law

259. The individual has an obligation to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be residing.

260. The obligation of obedience to the law is well known, even from ancient times.[184] But which law should the individual obey? The just and good law,[185] the law which protects every individual without discrimination of any kind and the general welfare. The law which is based on a democratic constitution and on the principles of justice, equity, equality and clarity.

261. Law must balance the interests of the individual against the interests of society, and each set of interests is differently affected by moral codes.[186]

262. Accordingly, every legally capable individual is, in principle, bound to demand the review of the constitutionality of the law and the legality of any orders adressed to him. In practice, this responsibility belongs to the judge, who is obliged to examine the constitutionality of the law. If, for any reason, the rule of law should fail, the individual has the right and the duty to review the legality of any orders addressed to him and to disobey the law. According to Gandhi's philosophy, "civil disobedience is the direct contravention of specific laws . . .".[187]

263. In order to discuss and decide upon the complex political, social and legal issues involved in democracy and disobedience of the law, a variety of considerations should be taken into account. Among the first is the consideration related to the nature of the system of government from which the law derives.

264. It is often asserted that if the system is democratic this will make a crucial difference to the question of whether the individual should obey the law and orders or not. On the other hand, it is frequently said—especially by leaders of Governments that are generally considered democratic—that while disobedience may be justifiable under certain political systems, for instance, dictatorships, it is very seldom justifiable in a democracy. The following example is from a speech by a former Prime Minister of Australia; it was made at a time when there was widespread disobedience in opposition to the presence of Australian troops in South Viet Nam: "As to inciting people to break the law, I think there can be no excuse whatsoever for those in a community where the opportunity exists to change the law through the ballot box."[188]

265. The concluding remark of the Special Rapporteur on this particular question is that in a model democratic community, where a free democratic political system prevailed, there would be important reasons which vitally affect the individual's duty to obey laws emanating from that system. Among these reasons, the following two are the most important: the fact that a democratic community, in which all have equal power and there is no tendency for the majority to treat the minority with less than equal consideration, is a fair compromise between competing claims to

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[182] See also the comments of the Government of Greece, in paragraph 64 above.

[183] The old Greek constitutions traditionally wound up by proclaiming that the observance of the Constitution was dedicated to the patriotism of the people. The new democratic Constitution in force has a good deal more to say on the subject. See the editorial comment in *The Times* of 17 June 1975, "The new Greek Constitution".

[184] Athenian democracy of the fifth century B.C. appears as the exercise of sovereignty by free and equal citizens under the aegis of the law. The noblest idea of laws is to be found expounded in the famous prosopopoeia of Plato's *Crito*. It shows contemporary man the kind of respect a great mind believed the laws merited, even if he considered them bad. It is the individual's duty to execute the orders of his State, unless by legitimate means the State may be induced to alter its decision. Each one is free, after he has been invested with civic rights, to renounce them and leave the country with all his possessions; but he who remains enters wittingly upon a contract to obey the laws. G. Glotz, *The Greek City and its Institutions* (London, Routledge, 1969), p. 140.

[185] See J. V. Bondurant, *Conquest of Violence: The Gandhian Philosophy of Conflict* (Princeton, N.J. Princeton University Press, 1958), pp. 3–29. Law (*nomos*) should not be merely opined but must be based on truth. This was the kind of *nomos* that Plato envisaged for the societies he visualized. See H. D. Rankin, *Plato and the Individual* (London, Methuen, 1964), p. 106. In one of the famous tragedies of Sophocles, *Antigone*, the presentation of the conflicting claims of State authority and an individual's conscience can be seen. Thus Antigone resolves to bury her brother Polyneices, slain in his attack on Thebes, in defiance of King Creon, who rules in his stead. She is caught in the act by Creon's watchmen and brought before the King. She justifies her action by asserting that she was bound to obey the eternal laws of right and wrong in spite of any human ordinance. Creon, unrelenting, condemns her to be immured in a rock-hewn chamber. See also P. Modinos, *Introduction a l'étude de droits de l'homme* (Strasbourg, Council of Europe, 1963), pp. 3–4.

[186] R. A. Newman, ed., *Equity in the World's Legal Systems: A Comparative Study Dedicated to Rene Cassin* (Brussels, Bruylant, 1973), p. 15.

[187] See Bondurant, *op. cit.*, p. 36.

[188] From a speech by the Rt. Hon. John Gorton, *The Australian*, 27 August 1970, p. 1.

power; and the fact that participating in good faith gives rise to an obligation to act as if one had consented to be bound by the result of the decision-making procedure.[189] Hence these important reasons for obeying the law in a democratic community apply only when no rights essential to the functioning of a fair compromise decision-making procedure have been infringed. Among such rights are, for example, the right of free expression and the right of free participation in elections.

12. The defence of "superior orders"

266. On the very complex issue of "superior orders",[190] the following concluding remarks should be made.

267. As has already been mentioned, war crimes include acts contrary to international law perpetrated in violation of the law of the criminal's own State, such as killing or plunder for the satisfaction of private lust and gain, as well as criminal acts contrary to the laws of war committed by order and on behalf of the enemy State. To that extent the notion of war crimes is based on the view that States and their organs are subject to criminal responsibility.[191]

268. The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent.[192] A court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisal. Nevertheless, even in this case, the indiscriminate practice of reprisals, in particular against children or aged or wounded persons, or collective punishment should unreservedly be condemned.

269. The question of "superior orders" is governed by the major principle that members of the armed forces, in particular, are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.

270. In some cases, not only members of armed forces but also civilian personnel have claimed that they were acting under "superior orders".

271. In 1945, the Charter of the International Military Tribunal of Nuremberg expressly rejected the plea of superior orders as an absolute defence. In article 8 it provided the following: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires".[193]

272. In order to establish criminal liability for a breach of the laws of war by omission to act, there must be proved a legal duty to prevent or redress the act committed, knowledge of the contravention, and actual power to intervene. The majority of the members of the International Military Tribunal for the Far East disagreed with a minority of the members in individual cases on whether all the constituent elements of omission were fulfilled; they all accepted, however, the general tests, which are formulated in Judge Röling's dissenting opinion.[194]

13. Duty to protect the human environment

273. It is the duty of every individual to contribute to the protection and improvement of the human environment for the growth and well-being of all members of the community.

14. Duty to participate in social progress and development

274. Every capable individual, as a basic element of society, has the duty to participate actively in defining and achieving the common goals of social progress and development of the community.[195] These goals include, the establishment of harmonious balance between scientific, technological and material progress and the intellectual, spiritual, cultural and moral advancement of humanity.

H. Duties of the individual to other individuals

1. Duty to respect other individuals

275. Among the most important duties of the individual, as has been mentioned above, is his obligation to respect and to protect human rights and

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[189] P. Singer, *Democracy and Disobedience* (Oxford, Clarendon Press, 1973), p. 133.

[190] In connection with superior orders and acts of subordinates, see, among others, M. S. McDougal and F. P. Feliciano, *Law and Minimum World Public Order* (New Haven, Yale University Press, 1961); and R. B. Lillich and F. C. Newman, eds., *International Human Rights: Problems of Law and Policy* (Boston, Little, Brown, 1979), p. 678.

[191] See paras. 121-136 above.

[192] L. Oppenheim, *International Law: A Treatise*, vol. II *Disputes, War and Neutrality*, 7th ed., H. Lauterpacht, ed., (London, Longmans, Green, 1952), p. 568.

[193] The Nuremberg Tribunal rejected the plea of superior orders put forward by the former Chief of the German High Command and by his Chief of Staff. In the case of the former, the Tribunal held: "Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification". In the case of the latter, the Tribunal said: "Participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes". See also R. I. Millex, *The Law of War* (Lexington, Mass., Lexington Books, 1975), p. 11.

[194] See B. V. A. Röling and C. F. Rüter, eds., *The Tokyo Judgement* (Amsterdam, APA-University Press, 1977), vol. II, pp. 1062–1064), based on the report presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919 (*American Journal of International Law*, vol. 14 (1920), pp. 95–154).

[195] "The international dimensions of the right to development . . . report of the Secretary-General" (E/CN.4/1334), paras. 110–114.

fundamental freedoms.[196] Indeed, the duty to respect and protect human rights and freedoms is incumbent not only upon Governments and other public authorities but upon individuals as well. This conclusion is mainly based on articles 2 to 6 in conjunction with articles 29 and 30 of the Universal Declaration of Human Rights, and the fifth preambular paragraph of the International Covenants on Human Rights, which grant the individual the fundamental right to be accorded the dignity of a human being and which morally and legally oblige everyone to respect this dignity. The same articles likewise state that it is the individual's duty to treat others in like manner. Hence, in this case, right and duty are perfectly balanced and require a spirit of understanding and tolerance.

276. This duty is also derived from the relevant provision of the Final Act of the Conference on Security and Co-operation in Europe.[197] The States participating in that Conference confirmed, *inter alia*, the right of the individual to know and act upon his rights and duties in the field of human rights.[198]

277. Further, article 19, paragraph 3, of the International Covenant on Civil and Political Rights, referring to freedom of expression, provides the following: "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities . . .". The inclusion of this paragraph and in particular the express reference to special "duties and responsibilities" was decided upon on the basis that freedom of expression is a precious heritage as well as a delicate instrument, in view of the powerful influence the modern media of expression exerts upon the minds of men and upon national and international affairs.

278. Every individual has the duty to respect the rights of his neighbour and to give more meaning to basic human rights by doing more to meet basic human needs and assure greater equity in the use of available resources.[199]

279. Every individual has the duty to respect the life, liberty and security of person of others.[200] The provision that everyone's right to life "shall be protected by law", contained in the second sentence of paragraph 1 of article 6 of the International Covenant on Civil and Political Rights, was intended to emphasize the duty of States to protect life and the duty of the individual to respect the international and municipal law relating to protection of the life of every human being.

280. The reference, in paragraph 2 of the aforementioned article 6 of the International Covenant, to the death penalty implies that adequate safeguards should be provided in order that the death penalty should not be imposed unjustly or capriciously in disregard of human rights. Thus, the death sentence could be imposed only: (*a*) as a penalty for the most serious crimes; (*b*) pursuant to the sentence of a competent court, and (*c*) in accordance with the law in force at the time of the commission of the crime and not contrary to the principles of the Universal Declaration, the Genocide Convention and the International Covenants.

281. The phrase "most serious crimes" is very vague and its sense differs from one country to another. In any event, the relevant conclusion of the Special Rapporteur is that "political crimes" should not entail the death penalty.

2. Duty to respect the rules concerning prohibition of torture and protection of human dignity

282. Every individual has the duty to protect the bodily integrity and human dignity[201] of every other individual.

283. The first clause of article 7 of the International Covenant of Civil and Political Rights reproduces the text of article 5 of the Universal Declaration of Human Rights. The wording chosen in this clause emphasizes the right of the individual not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

284. The word "torture" refers to both mental and physical torture. The provision of the above-mentioned first clause of article 7 of the International Covenant on Civil and Political Rights prohibits not only "inhuman" but also "degrading" treatment or punishment. "Inhuman treatment" means the deliberate infliction of physical or mental pain or suffering against the will of the victim.[202] As attitudes in the field of human rights are changing, these provisions should be allowed a dynamic interpretation. The word "treatment" is broader in scope than the word "punishment". The word "degrading" should also cover degrading situations, which under certain circumstances might be the result of the application of unjust or wrong economic or social factors or a tyrannical and oppressive national policy in general. In addition, there are reasons today for considering racial discrimination, for example, to be degrading as such, regardless of whether that would not have corresponded to the wish of some of the draftsmen of the Universal Declaration 30 years ago.

285. The aforementioned provisions on torture or cruel, inhuman or degrading treatment or punishment of articles 5 of the Universal Declaration and 7 of the International Covenant on Civil and Political Rights have been examined in the present study in conjunction

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[196] See paras. 245–247 above.

[197] Conference on Security and Co-operation in Europe, Helsinki, 1975, *Final Act* (Lausanne, Imprimeries Réunies, 1975), sect. 1 (*a*) VII.

[198] See also International Commission of Jurists, "Commentaries: The Helsinki Accord", *The Review*, No. 18 (June 1977), pp. 15–18.

[199] See the message of the Secretary-General of the United Nations on the occasion of the Human Rights Day observance on 10 December 1975 (United Nations Headquarters press releases, HRD/108, 110; GA/5544).

[200] Universal Declaration of Human Rights, art. 3; International Covenant on Civil and Political Rights, art. 6.

[201] Universal Declaration of Human Rights, art. 5; International Covenant on Civil and Political Rights, art. 7. See also the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 3452 (XXX) of 9 December 1975).

[202] F. Castberg, *The European Convention on Human Rights*, (Leiden, Sijthoff, 1974), pp. 83–84. In connection with the elaboration of a draft convention on torture and other cruel, inhuman or degrading treatment or punishment, see General Assembly resolution 32/62 of 8 December 1977, Economic and Social Council resolution 1979/35 of 10 May 1979 and Commission on Human Rights resolution 34 (XXXVI) of 12 March 1980.

with the provisions of article 10 of the International Covenant on Civil and Political Rights. Thus, article 10, paragraph 1, of the International Covenant on Civil and Political Rights provides: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". In addition, paragraph 3 of the same article states: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation . . . ".

286. In 1949, the Trusteeship Council recommended that corporal punishment should be abolished immediately in the Cameroons and Togoland under British administration and formally abolished in New Guinea.[203] The General Assembly, by its resolution 323 (IV) of 15 November 1949, gave its full support to that recommendation and recommended further the adoption of strong and effective measures to abolish immediately the corporal punishment of whipping in Ruanda-Urundi.

287. In 1955, the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the *Standard Minimum Rules for the Treatment of Prisoners*[204] worked out by an Advisory Committee of Experts established in accordance with the plan prepared by the Secretary-General and approved by the General Assembly in its resolution 415 (V) of 1 December 1950. The Economic and Social Council, in its resolutions 663 C I (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, approved those rules and recommended them to Member States.

288. The purpose of the Standard Minimum Rules for the Treatment of Prisoners is not to describe in detail a model system of penal institutions but, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what are generally accepted as being good principles and practice in the treatment of prisoners and the management of institutions. Rule 31, for instance, provides that corporal punishment, punishment by placing in a dark cell[205] and all cruel, inhuman or degrading punishment shall be completely prohibited as punishments for disciplinary offences.

289. The Draft Principles on Freedom from Arbitrary Arrest and Detention prepared by a committee established by the Commission on Human Rights[206] contain the provision that no arrested or detained person shall be subjected to physical or mental compulsion, torture, violence, threats or inducement of any kind, nor to the administration of drugs or any other means which tend to impair or to weaken his freedom of action or decision, his memory or his judgement.

290. The Sub-Commission on Prevention of Discrimination and Protection of Minorities took up the question of torture in the context of its debates on the human rights of persons subjected to any form of detention.

291. From a brief comparative study undertaken it was concluded that there were still certain basic gaps in all instruments governing the treatment of prisoners.

292. The Sub-Commission, by its resolution 7 (XXVII), made an attempt to combine those essential principles that required urgent attention in order properly to protect the detainee.

293. In October 1974, the debate in the Third Committee of the General Assembly led to the adoption of resolution 3218 (XXIX) intended to assist the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to come to grips with the problem of torture. The General Assembly, by the above-mentioned resolution, attempted to achieve some progress in the formulation of principles and guidelines for the prevention of torture. The Congress considered the treatment of offenders in custody with special reference to the implementation of the Standard Minimum Rules.

294. On the question of the human rights of persons subjected to any form of detention or imprisonment, the Sub-Commission considered a body of principles for the protection of all persons under any form of detention or imprisonment.[207] This body of principles was generally received as a set of rather broadly worded fundamental provisions, not as a code containing detailed rules regarding the treatment of detained persons. The formulation of the body of principles was generally conceived as a further step towards the protection of the human rights of detained persons, as it laid emphasis upon the concepts stressed by the General Assembly in its resolution 3453 (XXX) of 9 December 1975 regarding the responsibilities—ethical, penal and disciplinary—of the law enforcement officials and other persons involved in the processes of arrest, detention and imprisonment.[208]

295. The Commission on Human Rights accepted the relevant recommendation of the Sub-Commission and requested the Economic and Social Council to authorize the Chairman of the Sub-Commission to appoint a working group to prepare a revised draft body of principles for consideration by the Sub-Commission at its thirty-first session.[209] At its thirty-

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[203] *Official Records of the General Assembly, Fourth Session Supplement No. 4* (A/933), chap. II, sect. 1, part III (4); sect. 3, part II (3); and sect. 6, part II (4).

[204] United Nations publication, Sales No. 1956.IV.4, annex I.A.

[205] Confinement in isolation may, in the view of a German court, be contrary to the provision relating to the prohibition of torture or inhuman treatment if it harms the physical or mental health of the prisoner. Oberlandesgericht Hamburg, decision of 13 June 1963. *Neue Juristische Wochenschrift*, 3 October 1963, p. 1840.

[206] Commission on Human Rights resolution 2 (XIX) of 1963. See also *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* (United Nations publication, Sales No. 65.XIV.2).

[207] The Sub-Commission, by its decision 2 (XXIX) of 20 August 1976, appointed Erik Nettel as Special Rapporteur and entrusted him with the preparation, in co-operation with the Secretariat, of the first draft of a body of principles for the protection of all persons under any form of detention or imprisonment. For the draft, see E/CN.4/Sub.2/395 of 28 June 1977.

[208] E/CN.4/Sub.2/395, paras. 5 and 6.

[209] See the report of the Commission on Human Rights on its thirty-fourth session (*Official Records of the Economic and Social Council, 1978, Supplement No. 4* (E/1978/34).

The first trial of torturers took place in Greece in 1975. Amnesty International has published a report on this trial as a documentary record both of torture under a repressive Government and of an example of submitting officials who torture to due process of law. See *Torture in Greece: The First Torturer's Trial, 1975* (London, Amnesty International Publications, 1977), p. 61.

On the question of reported violations of human rights in Chile, fifth session, the Commission on Human Rights proposed, in its resolution 17 (XXXV) of 14 March 1979, that the Economic and Social Council request the Secretary General to transmit to all Governments the revised body of principles as contained in paragraph 109 of the report of the Sub-Commission on its thirty-first session,[210] to solicit their comments and to report to the General Assembly at its thirty-fifth session, so that the General Assembly could consider their adoption.

3. DUTY TO EXERCISE POLITICAL RIGHTS

296. Article 21 of the Universal Declaration of Human Rights and article 25 of the International Covenant on Civil and Political Rights relate to the political rights and duties of the citizen. Subparagraph (*a*) of article 25 of the International Covenant states, in general terms, that every citizen shall have the right to take part in the conduct of public affairs, directly or through freely chosen representatives. Subparagraph (*b*) of the same article, which refers to the right to vote and to be elected, is an application of the general rule laid down in subparagraph (*a*).

297. These political rights have their corresponding duties. Every citizen has the duty to respect and protect the democratic government of his State. The basic elements of the word "democracy" are *demos-cratos*[211] which establish the voice of the people. Democratic government[212] established the rule of State authority in place of the authority of chiefs, and individual responsibility in place of collective responsibility.[213] Thus, it is the duty of every citizen to vote and to be elected, when he is legally capable of doing so, at genuine, free and periodic elections which shall be by general and equal suffrage and shall be held by secret ballot, guaranteeing the expression of the will of the electors.

298. Democracies may call themselves direct, representative, Western, socialist, bourgeois or popular; they are, however, really democratic when they respect human rights and fundamental freedoms as contained in the Universal Declaration and in the International Covenants and allow every citizen to participate in political life at the local and national level by means of free elections, enabling each people to choose periodically its own representatives and Government. Accordingly, a Government must be established by free popular vote.

4. DUTY TO PROMOTE CULTURE

299. It is man's duty to practice, uphold and promote culture by all means at his disposal, for culture is the highest social and historical expression of the human spirit.

300. Each culture has a dignity and value which must be respected and preserved. Every people has the right and the duty to develop its culture. Cultural co-operation is a right and a duty for all peoples and all nations, which should share with one another their knowledge and skills.[214]

5. DUTY OF MUTUAL HELP AND SOLIDARITY

301. The duty of mutual help and solidarity is based mainly on the provisions of the second sentence of article 1 of the Universal Declaration, which provides that all human beings "are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

302. Solidarity is a social fact which postulates a duty for the individual to comply with the will of the community as an expression of that solidarity.

303. Hence, it has been considered that it is a duty to protect the weaker against the stronger and the oppressed against the oppressor.

I. Duties of the individual in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights

304. The American Declaration of the Rights and Duties of Man[215] dealt not only with the rights of individuals but also with the duties that each individual owes to his family and to the community in which he lives.

305. It is noteworthy that almost all the paragraphs of the preample of the American Declaration refer to the duties of the individual. Thus paragraphs 2, 3, 4, 5 and 6 of the preamble read:

> The fulfilment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.
>
> Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.
>
> Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources.
>
> Since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.
>
> And, since moral conduct constitutes the noblest flowering of culture, it is the duty of every man always to hold it in high respect.

306. Further, the American Declaration, in chapter two (articles XXIX–XXXVIII), lists the following

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with particular reference to torture and other cruel, inhuman or degrading treatment or punishment, see, *inter alia*, the debate in the Commission on Human Rights at the thirty-fourth session, in particular at the 1453rd meeting, on 24 February 1978 (E/CN.4/SR.1453).

[210] E/CN.4/1296.

[211] "Demos" meant (*a*) part of a territory which belongs to a community, country; (*b*) population of a country; (*c*) mass of people; (*d*) later (in Athenian democracy only) people as opposed to the chiefs; and (*e*) mass of free citizens, democracy. See Glotz, *op. cit.* p. ix, footnote 6. The assembled Demos was sovereign; its functions were universal and its powers unlimited. The delegates of the Demos—in so far as delegates were necessary for deliberative, judicial and executive power—were appointed by lot.

[212] It was Athens' vocation to be the school of democracy. The dates 594–593 (the Constitution of Solon) and 508–507 (the Constitution of Cleisthenes) are great dates in the political history of the world. As G. Glotz wrote: "This 'Hellas of Hellas' was to give the people, to use a phrase of Plato's adopted by Plutarch, 'the purest liberty with unstinting hands' ", *op. cit.*, p. x.

[213] It is the proclamation of individual responsibility in the words "Peace and safety to the kinsmen of the accused" which gives the Eleatic *rhetra* of the seventh century such moral grandeur and historic importance.

[214] Articles I and V, respectively, of the Declaration of the Principles of International Cultural Co-operation.

[215] *Final Act of the Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948* (Washington, D.C., Pan American Union, 1948), resolution XXX. See above, Introduction, para. 126.

duties of the individual to his family and to the community:

(*a*) The duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality;

(*b*) The duty of every person to aid, support, educate and protect his minor children, and the duty of children to honour their parents always and to aid, support and protect them when they need it;

(*c*) The duty of every person to acquire at least an elementary education;

(*d*) The duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so;

(*e*) The duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be;

(*f*) The duty of every able-bodied person to render whatever civil and military service his country may require for its defence and preservation, and, in case of public disaster, to render such services as may be in his power; the duty to hold any public office to which he may be elected by popular vote in the State of which he is a national;

(*g*) The duty of every person to co-operate with the State and the community with respect to social security and welfare, in accordance with his ability and with existing circumstances;

(*h*) The duty of every person to pay the taxes established by law for the support of public services;

(*i*) The duty of every person to work, as far as his capacity and possibilities permit, in order to obtain the means of livelihood or to benefit his community;

(*j*) The duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively for the citizens of the State in which he is an alien.

307. The American Convention on Human Rights contains a simple statement that every person has responsibilities to his family, his community and mankind.[216]

J. The right to work and responsibilities flowing from it

308. In connection with the right to work and the responsibilities flowing from it, the following are the concluding considerations, based mainly on a concise comparative study of international instruments, replies of Governments, national constitutions, and in particular on the reply of the ILO.

309. The first international instrument in which the basis for the right to work was mentioned was the Constitution of the ILO (art. 1). The basis was later renewed in the Philadelphia Declaration.[217] None the less, it should be clarified that in this document no reference was made to the words "right to work", but rather to "the right to pursue material well-being and spiritual development in conditions of . . . economic security and equal opportunity".[218]

310. Article 23, paragraph 1, of the Universal Declaration of Human Rights provides for recognition of everyone's "right to work".[219]

311. Article 6 of the International Covenant on Economic, Social and Cultural Rights contains basic provisions by which the States parties recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and undertake to take appropriate steps to safeguard this right.

312. Another important international instrument which refers to the assurance at all levels of the right to work is the Declaration on Social Progress and Development.[220]

313. Two other instruments adopted at regional level mention *expressis verbis* the right to work:

(*a*) The European Social Charter,[221] which is in a certain sense the continuation and the corner-stone of the European Convention on Human Rights; and,

(*b*) The American Declaration of the Rights and Duties of Man.[222]

314. Further, a number of modern national Constitutions[223] guarantee the right to work. In particular, article 31 of the Constitution of Ecuador of 1978 expressly provides that work is a right and a social duty.

315. In connection with the right to work, it is appropriate to refer to the Employment Policy Convention, 1964 (No. 122) of the ILO,[224] which deals with a central aspect of measures aimed at realization of the right to work. This Convention provides, in article 1, paragraph 1, for the declaration and pursuit of an active policy designed to promote full, productive and freely chosen employment. Paragraph 2 of the same article spells out more fully what the aims of that policy should be, namely, (*a*) that there is work for all who are

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[216] American Convention on Human Rights, art. 32. See above, Introduction paras. 128–129. See also N. S. Rodley and C. N. Ronning, eds., *International Law in the Western Hemisphere* (The Hague, Martinus Nijhoff, 1974), pp. 186–187.

[217] See Introduction, paras. 24–27. See also N. Valticos, *International Labour Law* (Deventer, Kluwer, 1979), p. 19.

[218] See the analysis of the right to work in connection with article 6 of the International Covenant on Economic, Social and Cultural Rights in M. Ganji, *The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress* (United Nations publication, Sales No. E.75.XIX.2), part one, chap. II, sect. A.

[219] See G. Gurvitch, *La déclaration des droits sociaux* (Paris, J. Vrin, 1946), p. 126. C. W. Jenks wrote: "The 'right to work' is in the nature of a moral challenge to the economic system rather than of a right susceptible of legal definition and enforcement. It is therefore not surprising that no international labour convention guarantees, or is likely to guarantee, the right to work as such." Jenks, *op. cit.*,

[220] See Declaration on Social Progress and Development, art. 10. The Declaration was proclaimed by the General Assembly of the United Nations on 11 December 1969, by resolution 2542 (XXIV).

[221] Adopted at Turin, Italy, in October 1961. In this connection, see Valticos, *International Labour Law*, *op. cit.*, pp. 64–65.

[222] In Article XIV.

[223] See, for example, article 27 of the Constitution of the People's Republic of China, adopted on 5 March 1978, and article 51 of the Constitution of Portugal, which came into force on 25 April 1976 (see para. 89 above). The Constitution of Nigeria of 1979 in its article 17 (3) (*a*) and (*b*) provides that the State shall direct its policy towards ensuring that all citizens without discrimination have adequate opportunities to secure suitable employment and that all conditions of work are just and human. *Constitution of the Federal Republic of Nigeria, 1979*, ed. by the Federal Ministry of Information, Printing Division (Lagos, 1979).

[224] See Valticos, *International Labour Law*, *op. cit.*, pp. 116–118.

available for and seeking work; (*b*) that such work is as productive as possible; and (*c*) that there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin.

316. It is significant that the aforementioned Convention No. 122, while placing both positive and negative obligations on ratifying States (on the one hand, to promote productive employment, and on the other, to respect freedom of choice of employment), places no obligations or duties upon individuals. The Employment Policy Recommendation, 1964 (No. 122), which seeks to set out in considerable detail the range of measures appropriate for the carrying into effect of Convention No. 122, adopts a similar approach.

317. It may be noted that article 6 of the International Covenant on Economic, Social and Cultural Rights, which deals with the right to work, adopts an approach very similar to that of the above-mentioned ILO standards. On the one hand, it indicates that the right to work includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. On the other hand, it provides, in paragraph 2, that the steps to be taken by the State party for realization of the right to work should be directed to the achievement of full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

318. Moreover, in connection with the question of the existence of a duty to work, it may be useful to refer to a number of ILO instruments and reports. This question has been examined by the ILO Committee of Experts on the Application of Conventions and Recommendations in various surveys of forced labour. The Committee pointed out that, where the duty to work exists merely as a moral obligation and does not take the form of a legal obligation enforced by sanctions, it does not affect the application of the Conventions on forced labour.

319. On the other hand, national legislation that goes further and creates a legal obligation to engage in a gainful obligation, failing which those concerned are liable to compulsory direction to specified work or to penal sanctions, is incompatible with the relevant ILO Conventions.[225] The fact that Convention No. 29 in article 2, paragraph 2, makes provision for a number of limited exceptions would not provide a basis for considering that in international law there exists a duty to work. The Committee emphasized, more specifically, that the exception for work or service forming part of normal civic obligations, in article 2, paragraph 2(*b*), of this Convention, and exceptions relating to specific forms of civic obligations such as military service, work in emergencies and minor communal services (provided for in article 2, paragraph 2(*a*), (*d*) and (*e*)), must be read in the light of other provisions of the Convention and cannot be invoked to justify recourse to forms of compulsory service which are contrary to such other provisions.

320. As work is the basis of all human endeavour it constitutes a basic right with a considerable measure of responsibility. The individual who claims the right to work should at the same time be held responsible for the sensible exercise of that right.

K. The right to education and responsibilites flowing from it

321. Article 26 of the Universal Declaration of Human Rights and article 13 of the International Covenant on Economic, Social and Cultural Rights provide for the right of every individual to education.

322. The vital question agitating the twentieth century is that of education. Education should effectively contribute to the prevention of the establishment of a new order of things by violence. An order of things established by violence is tyrannical even when it is better than the old order. Therefore, it is the responsibility of every individual, through teaching and education, in particular of youth, to prevent violence as a means of achieving economic, social and political goals.

323. Hence, a principle of education, superior to any other theory, should be found which would guide individuals to the creation of a more humane and civilized world, teach them that this needs a certain degree of self-sacrifice and link them with their fellow men without making them dependent on the ideas of one single man or on the strength of all. It would teach them that to fight with peaceful means and to protect every individual against injustice and error for the benefit of their brothers is not only a right but an obligation.

324. Education ensures for the individual the free choice of means for achieving continuous progress in the conception of social welfare.

325. The individual has a right to education and a right to work in which his knowledge can be used. Without national education available to all individuals, equality of rights and responsibilities is a formula devoid of meaning, and the knowledge of responsibilities and the capacity of exercising rights are left to chance or the arbitrary will of those who choose the teachers.

326. The recommendation concerning education for international understanding, co-operation and peace and education relating to human rights and fundamental freedoms adopted by the General Conference of UNESCO at its eighteenth session contains certain provisions and concepts the implications of which could be regarded as constituting the obligations and responsibilities of the individual.

327. The Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples implicitly provides certain obligations of individuals towards other individuals and to the community as a whole. Young people should be brought up in a spirit of peace, justice, freedom, mutual respect and understanding in order to promote equal rights for all human beings and all nations, economic and social progress, disarmament

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[225] ILO Conventions Nos. 29 and 105. See also *Report III (Part 4 B), General Survey of the Reports relating to the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, International Labour Conference, 65th session, 1979 (Geneva, 1979), para. 45.

and the maintenance of international peace and security (principle I). All means of education, including as of major importance the guidance given by parents or family, instruction and information intended for the young should foster among them the ideals of peace, humanity, liberty and international solidarity and all other ideals which help to bring peoples closer together, and acquaint them with the role entrusted to the United Nations as a means of preserving and maintaining peace and promoting international understanding and co-operation (principle II).

328. Youth associations should take all appropriate measures within their respective fields of activity in order to make their contribution without any discrimination to the work of educating the young generation in accordance with these ideals. Such organizations, in conformity with the principle of freedom of association, should promote the free exchange of ideas in the spirit of the principles of the Declaration on the Promotion amoung Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples (principle V).

L. Duties of aliens[226]

329. An alien living in a State, whether permanently or temporarily, is subject, as are nationals, to the domestic law and cannot claim exemption from the exercise of territorial jurisdiction. He is often required to register his name with public authorities for the security of the State, and compelled, under the same conditions as nationals, to perform civic duties for the protection of the community in which he lives against epidemics, natural disasters and other dangers not resulting from war.

330. A distinction is recognized under international law between transient visitors and resident aliens who have established themselves with the intention of remaining indefinitely.

331. In any case, an alien is required not to interfere in the politics of the State of his residence.

332. Resident aliens, with the exception of those entitled to diplomatic immunity, may not claim exemption from ordinary taxes or customs charges. The State has the right to tax real property within its jurisdiction owned by non-resident aliens.

333. Resident aliens owe a temporary allegiance to the State of residence. It was generally accepted that aliens cannot be compelled to serve in the armed forces of the country in which they live. This general practice, however, has undergone some changes since the Second World War.[227]

M. Duties of refugees and stateless persons

334. The rights and duties of refugees and stateless persons are established by the Convention relating to the Status of Refugees[228] and by the Convention relating to the Status of Stateless Persons.[229]

335. By a general provision of these Conventions (art. 2), such persons are required to conform to the laws and regulations of the country in which they are living, as well as to measures taken for the maintenance of public order.

336. Further, another general provision is contained in the Declaration on Territorial Asylum, which, in article 4, provides that States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations.

337. Hence, all those who enjoy asylum are under the obligation not to engage in activities contrary to the purposes and principles of the United Nations.

N. Other miscellaneous duties of the individual to the community[230] and to other individuals provided for by national legislation

338. The comparative research undertaken in national constitutions and legislations leads further to the following general conclusions relating to the duties of the individual to other individuals and to his community.

339. Nearly all the national constitutions and the legislative and regulatory provisions examined provide for the following duties of the individual, in addition to those analysed in the preceding paragraphs:

(*a*) So to conduct himself in relation to others that everyone may freely and fully form and develop his personality;

(*b*) Not to be ignorant of the law, as expressed in the principle "Ignorance of the law is no excuse";

(*c*) To educate and protect his minor children and to support and protect his parents when they need assistance. It should be noted in this connection that the second paragraph of principle 7 of the Declaration of the Rights of the Child[231] provides that the best interests of the child shall be the guiding principle of those responsible for his education and guidance, and that responsibility lies in the first place with his parents;

(*d*) To acquire at least an elementary education;

(*e*) To participate in national civic activities, in particular in elections;

(*f*) To render the civil and military service his country may require. In certain countries[232] the individual is also obliged to render service in cases of emergency or calamity or in any circumstances likely to endanger the existence or well-being of the whole or part of the population;

(*g*) To co-operate with the State with respect to social security and welfare;

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[226] On the duties of aliens, see also Baroness Elles, *International Provisions Protecting the Human Rights of Non-Citizens* (United Nations publication, sales No. E.80.XIX.2), chap. VI.

[227] For example in the United States of America, under the Universal Military Training and Service Act of 1951 the United States assumed the right to require aliens admitted for permanent residence to serve in the Armed Forces (Public Law 51 of 1951, Sect. 1; 65 Stat. et L. 75). In addition, any alien in the United States who claims exemption from military service becomes permanently ineligible for United States nationality (Immigration and Nationality Act, Public Law 414 of 1952, Sect. 315 (A); 66 Stat. et L. 163, 242).

[228] See Introduction, paras. 91-100.

[229] See Introduction, paras. 101-105.

[230] See in this connection the statement made by Mr. Juvigny (France) at the 1296th meeting of the Commission on Human Rights, on 6 February 1975 (E/CN.4/SR.1296).

[231] Proclaimed by the General Assembly on 20 November 1959 (resolution 1386 (XIV)).

[232] For example, in the Dominican Republic, Ghana, Portugal, Spain.

(*h*) To pay taxes and to bear jointly the expenses resulting from natural disasters;

(*i*) To protect the natural environment;

(*j*) Not to abuse his rights and to act in good faith;

(*k*) To defend his country and its territorial integrity;

(*l*) To protect and show concern for cultural values and for the preservation of ancient monuments and places of historical interest.

340. Finally, it should be mentioned that in addition to the above-mentioned duties, in a great number of States of the world community certain other individual duties, obligations or responsibilities are established by constitutional, penal, civil, social and administrative law or by other regulatory provisions based on law.

Chapter III

RECOMMENDATIONS

341. The following are the recommendations of the Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities in connection with the duties of the individual to the community:

A. Teaching and education on human rights

The Sub-Commission should consider recommending to the Commission on Human Rights that it adopt the following text:

"The Commission on Human Rights, recalling that the General Assembly of the United Nations proclaimed the Universal Declaration of Human Rights 'as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms', recommends that the Economic and Social Council should request the General Assembly to make the following recommendations to Member States:

"(*a*) That human rights teaching and education should be developed at all levels in the context of both school and out-of-school education, in order that they may become accessible as part of a true system of life-long education to all individuals without any discrimination in all States, whatever their legal, social, economic and political status;

"(*b*) That the teaching of human rights should also be concerned with securing the observance of human rights in cases of armed conflict and should include the teaching of international humanitarian law (law of armed conflict);

"(*c*) That this teaching and education should be based on the relevant instruments and documents of the United Nations and the specialized agencies, particularly UNESCO, as well as the Geneva Conventions of 12 August 1949 and their Additional Protocols. Human rights teaching and education should *inter alia* aim at developing the individual's awareness of the ways and means by which human rights can be translated into social and political reality at both the national and the international level, and at making a contribution to economic and social progress and development and to the maintenance of world peace."

B. Draft declaration on the principles governing the responsibilities of the individual

The Sub-Commission might consider recommending that the Commission on Human Rights should recommend to the Economic and Social Council that it authorize the Sub-Commission to prepare a draft declaration on the principles governing the responsibilities of the individual in connection with, in particular, the promotion and observance of human rights and fundamental freedoms in a contemporary community, and to submit the draft declaration to the Commission on Human Rights at its thirty-ninth session.

Human rights should also be seen as an aspect of professional, ethical and social responsibility in the fields of research, study, teaching, etc.

This recommendation is based mainly on the fifth preambular paragraph of the International Covenants on Human Rights, on the Final Document of the International Congress on the Teaching of Human Rights (held at Vienna, 12–16 September 1978, under the auspices of UNESCO), and on Commission on Human Rights resolution 23 (XXXVI) of 29 Feburary 1980.

C. Elaboration of a study on the status of the individual in contemporary international law

The Sub-Commission might consider recommending that the Commission on Human Rights should recommend to the Economic and Social Countil that it authorize the Sub-Commission to undertake a study on the status of the individual in contemporary international law.

The Special Rapporteur has touched on this subject in the present study but believes that it should be examined further. The question of the individual as a subject of international law is one of the most acute, important and complex issues in the modern world community.

The study in question will contribute, *inter alia*, to protection of the individual at the international level, to recognition of his responsibilities originating from the rules of international law and international instruments on human rights, and to the further development of modern international law.

Part two

LIMITATIONS ON THE EXERCISE OF CERTAIN HUMAN RIGHTS AND FREEDOMS

Chapter I

GENERAL VIEW

1. One of the most important tasks in promoting human progress is to maintain a proper balance between the interests of the individual and those of a democratic society and between individual and collective rights. Individual freedom has to be balanced with the freedom of other individuals and with the reasonable demands of the community. It is axiomatic that the rights of the individual are limited by the rights of other individuals. Similarly, the rights and freedoms of individuals must in certain cases yield to such vital necessities of the State as, for example, the necessity, mentioned in the Universal Declaration of Human Rights, of "meeting the just requirements of morality, public order and the general welfare in a democratic society". Thus, in an organized society such as a State there is an absolute necessity for harmonizing the rights of the individual on the one hand with the requirements of the community on the other.

2. Recognition of limitations or restrictions on the exercise of certain human rights and freedoms is contained, first, in the Universal Declaration of Human Rights (art. 29, para. 2) and, secondly, in the International Covenant on Economic, Social and Cultural Rights (art. 4; art. 8) and the International Covenant on Civil and Political Rights (art. 4; art. 12, para. 3; art. 14, para. 1; art. 18, para. 3; art. 19, para. 3; art. 21; art. 22, para. 2).

3. The general principles governing limitations and restrictions on human rights and freedoms are established in article 29, paragraph 2, and article 30 of the Universal Declaration, in articles 4, 5 and 8 of the International Covenant on Economic, Social and Cultural Rights and in articles 4, 5, 12, 14, 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights.

4. There is no inevitable incompatibility between the essential purpose of the Universal Declaration and the International Covenants, which is to secure and protect human rights and freedoms, and the welfare and exigencies of the State, provided it is clearly established that limitations or restrictions must not operate in a manner contrary to the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and other international instruments on human rights.

5. The Universal Declaration provides a list of basic human rights and fundamental freedoms; it also sets forth, in general terms, the admissible limitations (art. 29, para. 2, and art. 30).

6. The International Covenants spell out the rights guaranteed and specify the conditions justifying restrictions or limitations on their exercise. In particular, a number of substantive articles of the International Covenant on Civil and Political Rights contain clauses on limitations besides the provisions on derogations contained in article 4.

7. Limitations or restrictions are placed not only on the exercise of certain rights of the individual but also on the power of the State to restrict the rights arbitrarily in any manner it might choose. This is the main purpose of, for example, the general limitations laid down in article 4 of the International Covenant on Economic, Social and Cultural Rights.

8. Article 5 of both International Covenants contains saving clauses. Thus, it concerns questions relating to the destruction or limitation of the rights and freedoms recognized in the Covenants and the safeguarding of rights recognized independently of the Covenants.

9. In both International Covenants, the purpose of article 5, paragraph 1, which was derived from article 30 of the Universal Declaration, is to provide protection against any misinterpretation of any provision of the International Covenants which might be used to justify infringement of any of the rights or freedoms recognized in the Covenants or the restriction of any such right or freedom to a greater extent than is provided for therein.[1] The paragraph is also designed to prevent any State, group or person from engaging in activities aimed at the destruction of any of the rights or freedoms recognized in the Covenants or at their limitation to a greater extent than is provided for therein. Any State, group or individual engaging in such activities cannot invoke the International Covenants to justify them.

10. It should also be noted that article 5, paragraph 1, of the International Covenants has the same meaning as article 30 of the Universal Declaration inasmuch as it, too, contains an explicit and binding interpretative rule in the sense of an absolute guarantee of the substance of human rights. Hence, the interpretative rule in article 5, paragraph 1, of the International Covenants prohibits any unreasonable interpretation of the limitations on human rights envisaged in, for instance, articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights and articles 4, 12, 14, 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights.

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[1] See *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (part II), document A/2929, chap. V, para. 55.

11. Furthermore, in article 5, paragraph 2,[2] the International Covenants contain a provision which covers possible conflicts between the Covenants and laws, regulations and customs of States parties or agreements other than the Covenants binding upon them.

12. Article 5, paragraph 2, also prevents any State party from limiting rights already enjoyed by individuals within its territory on the ground that the International Covenants do not recognize such rights or recognize them to a lesser extent.

13. Thus, in both International Covenants, article 5, paragraph 2, establishes the rule that in case of conflict between the International Covenants and the laws, regulations and customs of a State party, the provisions giving maximum protection for the rights and freedoms of the individual should apply.

A. Preparatory work relating to article 29, paragraph 2, of the Universal Declaration of Human Rights

1. THE SAN FRANCISCO CONFERENCE

14. It may be recalled that at the United Nations Conference on International Organization (San Francisco, 1945), which drafted the Charter of the United Nations, a proposal was submitted which contained a declaration of essential human rights. The declaration was to be appended to the Charter and made an integral part of it.

15. One paragraph of the preamble of the proposed declaration[3] related to the subject-matter of the present study. It read as follows:

> In society complete freedom cannot be attained; the liberties of the one are limited by the liberties of others, and the preservation of freedom requires the fulfilment by individuals of their duties as members of society.

Article 18 of the proposed declaration, entitled "Limitations on exercise of rights", provided that:

> In the exercise of his rights everyone is limited by the rights of others and by the just requirements of the democratic state.

The Conference did not proceed with the proposal, stating that it required more detailed consideration.[4]

2. COMMISSION ON HUMAN RIGHTS

16. At its first session, the Economic and Social Council adopted, on 16 February 1946, resolution 1/5 on the establishment of a Commission on Human Rights. Pursuant to that resolution, the nuclear Commission on Human Rights met in New York from 29 April to 10 May 1947. It had before it various documents relating to an international bill of human rights,[5] including a statement of essential human rights presented by the delegation of Panama. In that statement, it was stressed that the proposed article on limitations on the exercise of rights prohibited any person from abusing his rights; it recognized the general relativity of rights and the fact that any right could be abused if it was exercised in such a way as to deprive another individual or the State of important rights.[6]

17. In a draft resolution proposing the adoption by the General Assembly of a "General Act on Human Rights", after an enumeration of rights, there was a provision which read:

> Nothing mentioned in this Act shall be construed as not obligating the individual to his corresponding duties to his own State and to the international community under the United Nations.[7]

18. At its first session (27 January–10 February 1947), the Commission held a general debate on the international bill of human rights, during which reference was made to the relationship between the individual and the social group to which he belongs. In the opinion of one member, the human person should be considered more important than the racial, national or other group to which he might belong, and any social pressure on the part of the State, or of religious or racial groups, that involved the automatic consent of the human being was reprehensible. This view was criticized by other members who stressed that there was no unrestricted liberty in any modern community and that the human being was above all a social being. Therefore, parallel with the list of the rights of the individual, a list of the rights of the community ought to be drawn up.

19. It was stated that despite differences of opinion it could be inferred from the debate that the Commission recognized that the individual's rights ought to be subordinated to those of the national community and the international community.[8] It was thought that that principle could serve as a guide for the drafting group which the Commission had decided to establish in order to formulate a preliminary draft of an international bill of human rights.[9]

20. At its second session (6–17 December 1947), the Commission had before it the report of the Drafting Committee[10] to which were annexed various drafts that had been considered by the Drafting Committee and that contained provisions relevant to the present study. Annex A to the report consisted of a draft outline of an international bill of human rights prepared by the Secretariat. Article 2 of that draft outline read:

> In the exercise of his rights everyone is limited by the rights of others and by the just requirements of the State and of the United Nations.[11]

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[2] Although these are variations in the texts of paragraph 2 of article 5 in the two Covenants, discussions during the preparatory work did not indicate any difference in interpretation.

[3] United Nations Conference on International Organization, document G/7 (g) (2).

[4] See *United Nations Action in the Field of Human Rights* (United Nations publication, Sales No. E.74.XIV.2), p. 8.

[5] The first item of the work programme established for the Commission by the Economic and Social Council in its resolution 1/5 was the preparation of an international bill of human rights. At its second session, in 1947, the Commission decided that the international bill of rights would consist of more than one international instrument. In this respect, see also J. P. Humphrey, "The Universal Declaration of Human Rights: its history, impact and juridicial character", in B. G. Ramcharan, ed., *Human Rights: Thirty Years after the Universal Declaration* (The Hague, Martinus Nijhoff, 1979), pp. 22–28.

[6] E/HR/3, p. 16.

[7] E/CN.4/11, p. 2.

[8] E/CN.4/SR.14, p. 5.

[9] *Official Records of the Economic and Social Council, Fourth Session, Supplement No. 3* (E/259), paras. 10–13.

[10] E/CN.4/21.

[11] *Ibid.*, annex A, p. 8.

21. One delegation suggested that that text should be reworded to read:

> The State is created by the people for the promotion of their welfare and the protection of their mutual rights. In the exercise of his rights everyone is limited by the rights of others.[12]

22. According to another suggestion, articles 2 and 4 of an international declaration of human rights would read as follows:

> *Article 2*
>
> The object of society is to enable all men to develop, fully and in security, their physical, mental and moral personality, without some being sacrificed for the sake of others.
>
> . . .
>
> *Article 4*
>
> The rights of all persons are limited by the rights of others.[13]

23. The Drafting Committee itself put forward the following two alternatives for the articles in question:

First alternative (three articles—articles 2, 3 and 4):

> *Article 2*. The object of society is to afford each of its members equal opportunity for the full development of his spirit, mind and body.
>
> . . .
>
> *Article 4*. In the exercise of his rights, everyone is limited by the rights of others.

Second alternative (one article only):

> *Article 2*: These rights are limited only by the equal rights of others. Man also owes duties to society through which he is enabled to develop his spirit, mind and body in wider freedom.[14]

24. At its second session, the Commission also had before it another proposal for a declaration of human rights, article 10 of which read as follows:

> Everyone, everywhere in the world, is entitled to the human rights and fundamental freedoms set forth in this Declaration without distinction as to race, sex, language or religion. The full exercise of these rights requires recognition of the rights of others and protection by law of the freedom, general welfare and security of all.[15]

25. The Commission referred the suggestions of the Drafting Committee to a Working Group, which produced the following text for article 2 of the draft international declaration of human rights:

> In the exercise of his rights everyone is limited by the rights of others and by the just requirements of the democratic State. The individual owes duties to society through which he is enabled to develop his spirit, mind and body in wider freedom.[16]

26. There was a short debate on that article, during which several amendments were submitted. One was to the effect that the Working Group's text should be replaced by the following:

> The rights of each may be limited to secure the rights of others, by the exigencies of public order, the security of the state and the normal development of collective life as expressed by law.[17]

It was explained that the purpose of the amendment was to bring the provision into line with the final provisions of the draft declaration on human rights, which specified the juridical acts—the law—required for the deprivation or limitation of rights, and the reasons on which such acts must be based: public order and the security of the State; normal development of social life; harmonious exercise of all rights.[18]

27. A second amendment read:

> In the exercise of their rights, everyone must recognize the rights of others and his obligation to society so that all may develop their spirit, mind and body in wider freedom.

The author of the amendment stated that he objected to the term "democratic state" in a context which introduced distinctions and which might cause difficulties. He preferred a simpler and broader text, proclaiming the rights of individuals and their obligations to society for the creation of a more liberal atmosphere.[19]

28. A third amendment proposed that the first sentence of the text quoted in paragraph 25 above be reworded to read:

> In the exercise of these rights everyone shall respect the rights of others and comply with the just requirements of the democratic State.[20]

29. The Commission rejected the above-mentioned amendments and adopted the text for article 2 drafted by the Working Group.

30. In another draft declaration submitted to the Commission at its second session, article 10 (corresponding to article 2 of the draft prepared by the Working Group) read as follows:

> The full exercise of these rights requires recognition of the rights of others and protection by law of the freedom, general welfare and security of all.

It was decided to include this text as a comment in the report of the Commission.

31. At its third session (24 May to 18 June 1948), the Commission had before it various proposals relating to the duties of the individual and the limitations on his rights. They were contained in the comments received from Governments on the draft international declaration of human rights, the draft international covenant on human rights and the question of implementation. One such proposal read as follows:

> Man owes duties to the society which allows him to shape and freely develop his personality. In their discharge, the right of each is limited only by the rights of others and by the just laws of the democratic State.[21]

32. An amendment was submitted suggesting the following wording:

> In the exercise of his rights everyone is limited by the rights of others, and by the legal safeguards for the liberty, general welfare and security of all, and by the just requirements of the democratic State.[22]

33. Another amendment submitted by the Commission proposed the replacement of article 2 by the following:

> The exercise of the rights and freedoms set forth in this Declaration shall be subject only to such restrictions as are necessary to secure due regard for the rights of other and the welfare and security of all.[23]

In support of this amendment, it was stated that the duties which man owed to society should not be mentioned if they were left undefined.[24] Moreover, because of the difficulty of arriving at a definition of the relationship between the individual and the State on which all could agree, the use of the expression "just requirements of the State" could lead to the severest restrictions on the rights of the individual. It was therefore advisable to define the restrictions on the rights of the individual in terms of the welfare and security of all, and also to avoid the philosophical consideration which claimed that society enabled the individual to develop his spirit, mind and body in wider freedom; that was also a highly controversial statement.

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[12] *Ibid.*, annex C, p. 41.

[13] *Ibid.*, annex D, p. 51.

[14] *Ibid.*, annex F, p. 73

[15] E/CN.4/36, p. 3.

[16] *Official Records of the Economic and Social Council, Sixth Session, Supplement No. 1* (E/600), annex A, p. 15.

[17] E/CN.4/SR.34, p. 6.

[18] *Official Records of the Economic and Social Council, Sixth Session, Supplement No. 1* (E/600), annex A, p. 23.

[19] E/CN.4/SR.34, p. 6.

[20] *Official Records of the Economic and Social Council, Sixth Session, Supplement No. 1* (E/600), annex A, p. 22.

[21] E/CN.4/82/Add.8, p. 2.

[22] E/CN.4/85, p. 15.

[23] E/CN.4/99, p. 1.

34. Various views were expressed on the inclusion in the article of the term "democratic State". It was said that the concept of democracy had come to have different meanings in different countries. The declaration should not use a concept susceptible of various definitions or interpretations. With regard to the notion of State, it was stated that a distinction between State and society might lead to abuses, since the State should act in the name of society. Not all countries considered the State as a desirable entity in itself, with rights that might conflict with the rights of the individual. The rights of a democratic State had not been defined by an international instrument. It would therefore be desirable either to accept the amendment quoted in paragraph 33 above or to speak of a "democratic society".

35. In support of maintaining the notions of the State and of democratic society, it was contended that they should raise no difficulties, as they were embodied in documents signed during the Second World War. Several features common to all democracies could be specified: the equal right of all citizens to participate in the activities of the Government; the fact that officials were elected and subject to control; the opportunity given to the masses to participate in government; the obligation for a minority to submit to the majority of the people; and accessibility to all offices of State. In modern democracy, the State was not a power imposed on society by force. It was a product of society.

36. Democracy was defined as government of the people, by the people, for the people. It was stressed that the criterion of democracy in any nation was the extent to which human rights were really respected.

37. In the course of the debate, the following oral amendment to the text reproduced in paragraph 32 above was proposed:

> In the exercise of his rights everyone is limited by the rights of others and by his duties to the democratic society which enables him freely to develop his spirit.[25]

The author of the amendment pointed out that the wording emphasized the purpose of the article: every right carried obligations with it.

38. A drafting Sub-Committee appointed by the Chairman of the Commission produced the following text for the article:

> 1. Everyone has duties to the community which enables him freely to develop his personality.
>
> 2. In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of general welfare in a democratic society.[26]

39. The Commission adopted that text; it rejected a proposal to add the words "and a democratic State" at the end of the second paragraph.

40. Later during the session, in the course of a further reading of the draft declaration, the Commission considered the following text submitted for article 2, paragraph 2:

> In the exercise of all the rights and freedoms enumerated in this Declaration, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and to the requirements of morality, of general welfare and of public order in a democratic society.[27]

41. The observation was made that the mention of "morality" and "public order" was particularly necessary for the French text, since in English, "general welfare" included both morality and public order. It was also suggested that the order of the terms should be transposed and that the text should read as follows: ". . . and to the requirements of morality, public order and general welfare in a democratic society".

42. It was argued, however, that the expression "public order" should not be used because, given its wide definition, it might lend itself to various interpretations. Arbitrary acts and even crimes had been committed under the pretext of defending public order. For those reasons, the wording of article XXVIII of the American Declaration of the Rights and Duties of Man[28] was deemed preferable by certain representatives, and it was suggested that the words "public order" should be replaced by the expression "security for all", which was used in article XXVIII of the American Declaration.

43. In rebuttal of those arguments and proposals it was pointed out that, in French, the idea of public order was in no way associated with political theories; it had a purely administrative significance and corresponded to public morality, peace and security. Since the declaration was to be a legal text, it was better to adopt an expression such as "public order", which had a definite legal meaning, rather than use vague terms.

44. Another proposal made in the course of the debate was that the phrase "in accordance with the just requirements of the democratic State should be added to the text reproduced in paragraph 37 above.

45. The Commission rejected both proposals and adopted as paragraph 2 of the article the text quoted in paragraph 40 above.

46. Subsequently, certain drafting changes were made to paragraph 2 of article 2. Article 2 was renumbered and became article 27 of the draft declaration transmitted to the General Assembly.

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[24] E/CN.4/SR. 50, p. 16.

[25] E/CN.4/SR.51, p. 6.

[26] E/CN.4/111, p. 1.

[27] E/CN.4/SR.74, p. 11.

[28] Article XXVIII reads as follows: "The rights of man are limited by the rights of others, by the society of all, and by the just demands of the general welfare and the advancement of democracy." For the text of the Declaration, see *Final Act of the Ninth International Conference of American States, Bogotá*, Colombia, 30 March–2 May, 1948 (Washington, D.C., Pan American Union, 1948), resolution XXX.

47. A statement on the results of the Commission's work was appended to the report of the third session of the Commission.[29] According to that statement, one negative aspect of the draft was the failure to include any concrete obligations whatsoever on the part of the individual towards his native land, the people to which he belonged and the State. One of the amendments to the draft declaration attached to that statement for transmission to the General Assembly suggested the addition of the following words at the end of paragraph 2 of article 27: "and also the corresponding requirements of the democratic State".[30]

3. THIRD COMMITTEE OF THE GENERAL ASSEMBLY

48. The Third Committee of the General Assembly considered the draft international declaration of human rights[31] at the first part of its third session. Article 27 of the draft read as follows:

> 1. Everyone has duties to the community which enables him freely to develop his personality.
>
> 2. In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of morality, public order and the general welfare in a democratic society.

49. While most representatives agreed with the ideas contained in the above-mentioned text, many disagreed with the wording. Thus, the debate in the Third Committee[32] was concentrated mainly on various amendments which had been submitted.[33] After adoption of the draft articles by the Committee, a few general comments were made regarding the individual's duties to the community and the question of limitations on human rights.

(a) *General comments*

50. In connection with the question of limitations on human rights, the paramount importance of the principle of legality, deeply rooted in legal traditions and incorporated in many constitutions, was stressed. It was emphasized that any limitations introduced by the State in defence of morality, public order and the general welfare must be justifiable. They must also have a legal form and be generally applicable.

51. The following main criticisms were levelled against the contents of paragraph 2 as finally adopted by the Third Committee (see para. 48 above):

(*a*) Individual liberty had to be balanced with the liberty of other individuals and with the reasonable demands of the community;

(*b*) The "most important task" concerning human progress was to find the proper balance between the interests of the individual and the interests of society;

(*c*) The paragraph might provide a loophole permitting passage of laws limiting basic human rights and freedoms; the word "only" did not afford sufficient protection against arbitrary limitations;

(*d*) While the requirements of morality, public order and the general welfare were recognized by the laws of all nations, the concept of democracy was still inadequately defined and unknown to jurisprudence;

(*e*) A general article dealing with limitations on human rights and freedoms could give rise to certain arbitrary acts; it was therefore appropriate to include a reference to the purposes and principles of the United Nations.

(b) *Amendments*

52. The amendment to paragraph 2 transmitted to the General Assembly by the Commission on Human Rights (see para. 47 above), was defended on the grounds that: (*a*) the most important task concerning human progress "was to find the proper balance between the interests of the individual and the interests of society"; (*b*) all the rights laid down in the declaration would be implemented in democratic societies by the democratic State; (*c*) the law was nothing without the machinery to implement it and, at the present time, that machinery was the State; (*d*) the democratic State must be able to have certain indispensable rights, in order to ensure the defence of its citizens; (*e*) far from restricting the article's scope, the purpose of the amendment was to give the State the necessary means for guaranteeing the enjoyment of individual rights.

53. It was further maintained that the proposed text placed the democratic State on the same plane as democratic society; it did not tend to ensure the supremacy of the State. Its purpose was to guarantee the community against any abuse of rights by the individual. Failure to mention the existence of the democratic State in the declaration might lead to the belief that it was not a question of defending the rights of citizens, in the sense that the French Revolution had given to that word, but the rights of stateless persons without ties with any society organized in the form of a State. Moreover, it was thought necessary to affirm the sovereignty of the democratic State, if only in order to conform to the spirit of the Charter of the United Nations.

54. The following arguments were adduced against the inclusion of the phrase "and also the corresponding requirements of the democratic State" at the end of paragraph 2: (*a*) the requirements of the democratic State were covered by the reference to the requirements of a democratic society and therefore it was unnecessary to have an explicit provision in the declaration to that effect; (*b*) the phrase lent itself to the interpretation that the State had the right to control the individual, whereas the individual was the basis of society and the State was able to function because of that fact; (*c*) to introduce a reference to the democratic State would unduly restrict the scope of the article, as the concept of a democratic society was much broader, encompassing the community, the State and the international order; (*d*) since the definition of the "corresponding requirements" of a State would be specified by that State, it could, under the terms of the amendment,

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[29] *Official Records of the Economic and Social Council, Seventh Session, Supplement No. 2* (E/800), appendix, pp. 29–35.

[30] *Ibid., Supplement No. 2* (E/800), p. 35.

[31] *Ibid.*, annex A.

[32] *Official Records of the General Assembly, Third Session, Part I, Third Committee*, 153rd to 155th meetings, pp. 642–670.

[33] For a recapitulation of amendments to article 27, see *Official Records of the General Assembly, Third Session, Part I, Third Committee, Annexes*, agenda item 58, document A/C.3/304/Rev.2.

annul all individual rights and freedoms contained in the declaration, thus opening the door to abuses by the State; (*e*) if the phrase were adopted, the impression would be created that the State was higher than—and had absolute rights which were not conditioned by the requirements of—morality, public order and the general welfare.

55. The amendment was rejected by 23 votes to 8, with 9 abstentions.

56. Another proposal was that the words "prescribed by law soley for the purpose of securing" be substituted for the words necessary to secure".[34]

57. The sponsor of the proposal stated that its purpose was to introduce two clear ideas into the text of article 27, namely, that fundamental human rights could be curtailed only by law, and that such laws could be enacted only when required on the grounds of morality, public order and the general welfare in a democratic society. It was believed that personal liberty would be better protected by such a provision, which would give more control to public opinion in matters concerning limitations of human rights, since a law—in contradistinction to an individual administrative measure—needed the full support of public opinion. While it was necessary to have a police force to maintain public order, police powers could only be exercised in conformity with the laws of the country.

58. It was further pointed out that unless article 27 contained a mention of the law, the declaration could not be said to be universally applicable. By requiring that limitations should be prescribed by law, the proposal was intended to protect the individual against abritrary measures which public authorities might be tempted to introduce through administrative channels. It was said that such a guarantee would be meaningful only in a democratic State, since in an authoritarian State the legislative power was not independent of the executive power.

59. Those opposed to the proposal contended that its language was too restrictive. Irrespective of the intention of its sponsor, the actual effect of the amendment would be to exclude the concept of moral force from article 27. It was further maintained that it was dangerous to say that rights could be limited only by law, as tyrannical laws had been known to exist and perfectly justified limitations might be imposed on the individual by society through other means. The criterion for such limitations would be justice, which was higher than any law.

60. In refuting those arguments, the sponsor of the amendment emphasized that it had no restrictive effect on the provisions of paragraph 2 of article 27. The aim of the article was to permit a State, under certain conditions, to limit the exercise of the essential rights of man. The amendment, in turn, was intended to establish up to what point the State could limit the free exercise of those rights. If it was desired to guarantee the faithful application of the declaration of human rights, the principle should be adopted that limitations to be set by public authorities could only be so set in accordance with pre-established standards, i.e. in accordance with provisions legally enacted. Thus, human beings would have the guarantee that they would be governed according to rules, and not according to the whim of their rulers.

61. It was added that, because the amendment left all the last part of paragraph 2 as it was, it took into account that man, in the exercise of his essential rights, was subject to other limitations than those of law. It was also said that the free will of man was undeniably limited, if only by the demands of his conscience, the rules of positive morality, or the standards set by social conventions.

62. The amendment was adopted by 21 votes to 15, with 7 abstentions.

63. Another amendment to paragraph 2 suggested the addition of the words "of national sovereignty and solidarity" after the words "the requirements of morality".[35] Its sponsor explained that it was necessary to introduce the concepts of "national sovereignty" and "solidarity" because the notion of democracy was interpreted in many different ways. The introduction into article 27 of the principle of solidarity would permit States to combat subversive groups which attacked them from within. Similarly, the mention of national sovereignty would help them to resist external aggression in times of war. If the Committee rejected the amendment it should do so on the understanding that the concepts of national sovereignty and solidarity were included in the words "general welfare".

64. Various views were expressed against the adoption of the amendment. It was stated that the introduction of the concepts of "national sovereignty" and "solidarity" might unduly restrict the provisions of article 27 and be used to justify arbitrary acts. The concept of "solidarity", which could be interpreted in different ways, was in any case covered by the basic text. It did not seem appropriate to make a reference to subversive action in the declaration. The word "sovereignty" might also lend itself to divergent interpretations.

65. The amendment was voted on in parts. The first part, proposing that the words "of national sovereignty" should be added after the words "requirements of morality", was rejected by 17 votes to 7, with 7 abstentions. The second part, suggesting the addition of the words "and solidarity" was rejected by 17 votes to 7, with 19 abstentions.

66. Another amendment, which was subsequently withdrawn, proposed the deletion of the words "morality, public order and" from paragraph 2,[36] on the grounds that the concepts they covered overlapped that covered by the words "the general welfare". In the past, the invocation of public order had often led to the infringement of human rights and freedoms.

67. It was pointed out, however, that to delete the mention of morality and public order from paragraph 2 would be to base all limitations of the rights granted in the declaration on the requirements of general welfare in a democratic society and consequently to make them subject to the interpretation of the concept of democ-

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[34] *Ibid.*

[35] *Ibid.*

[36] *Ibid.*

racy, on which there was the widest possible divergence of views. Moreover, the notion of "general welfare" did not fully cover the concept of public order; rather than delete the concept of public order, it might be wider to add the words "national security". It was further stressed that while the English expression "general welfare" was very wide, the corresponding expression in the French text, "*bien-être général*", had a much more restricted meaning, traditionally confined to economic and social questions. In contrast, the expression "*ordre public*" covered anything essential to the life of a country, including, primarily, its security. It was therefore necessary to keep both expressions, which, furthermore, were mutually complementary in both languages.

68. It was further proposed that paragraph 2 be amended to read:

> In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others, to satisfy the legitimate requirements of morality, public order and the general welfare in a democratic system, and to serve the purposes and principles of the United Nations.[37]

69. It was stated that the insertion of the word "legitimate" before "requirements" took account of the fact that the law did not always ensure the protection of human rights. The proposed addition at the end of the paragraph was intended to make it clear that the individual belonged to the international community as well as to his national community and that the interests of the organized international community were the same as his own. Furthermore, in a general article dealing with limitations on human rights and freedoms, it would be appropriate to include a reference to the purposes and principles of the United Nations.

70. Those who opposed the insertion of the phrase "to satisfy the legitimate" in paragraph 2 maintained that this insertion would give rise to conflicting and even irreconcilable interpretations. Moreover, since it was inconceivable that the claims of morality should be illegitimate, the inclusion of the phrase did not seem necessary.

71. The proposal to insert the words "to satisfy the legitimate" before the word "requirements" in paragraph 2 was accepted by 22 votes to 8, with 11 abstentions.

72. Another proposal put forward was that paragraph 2 should be amended to read:

> In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of loyalty, good faith, morality, public order and general welfare in a democratic society.

and that a new paragraph with the following text be added:

> These rights can in no case be exercised contrary to the principles and purposes of the United Nations.[38]

73. It was argued against this proposal that the word "loyalty" was not easy to define and that it was not unusual for people to have conflicting loyalties. The purposes and principles of the United Nations as stated in the Charter applied largely to the conduct of States and not of individuals. The first part of the amendment was further considered to contain controversial elements and to be far from clear.

74. The first part of the amendment, to insert the words "loyalty, good faith," in paragraph 2, was withdrawn.[39] The second part, with the addition of the words "and freedoms" after the word "rights", was adopted by 34 votes to 2, with 6 abstentions, as paragraph 3 of the article.

75. The addition of the words "and freedoms" after the word "rights" in paragraph 2, which had been the subject of two amendments, was also accepted.

76. In a second reading of the article,[40] the Third Committee decided to replace, in paragraph 2, the word "prescribed" by the word "determined".

77. After a discussion which extended over three meetings, five amendments were adopted and six were rejected, and finally the article as amended was adopted by 41 votes to none, with 1 abstention. The General Assembly unanimously adopted the following text, which became article 29 of the Universal Declaration of Human Rights:

> 1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
>
> 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
>
> 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

B. Preparatory work relating to the first draft international covenant on human rights

1. A CONCISE HISTORY OF THE FIRST DRAFT INTERNATIONAL COVENANT

78. The history of the draft covenant began in June 1947 when Lord Dukeston, representative of the United Kingdom of Great Britain and Northern Ireland, submitted the text of a proposed international convention to the Drafting Committee of the Commission on Human Rights. This text was studied by the Drafting Committee and in December 1947—in a somewhat revised form—was made by the basis for discussion in the Commission on Human Rights.

79. The Dukeston text underwent substantial revision in the Commission on Human Rights and a revised draft covenant emerged, to be circulated among all comments and proposals submitted by Governments. These comments were taken into account when further revisions were made.

80. At its fifth session, the Commission faced a dilemma. It wanted to produce a covenant which would give the fullest possible guarantees for human rights and freedoms. At the same time, it wanted to produce a draft that would receive wide support from Member States. If it set its sights too high it might produce an admirable document that few nations would sign or ratify. If, on the other hand, it made ratifications its main concern, the covenant might emerge as a weak instrument for the defence of human rights. The

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[37] *Ibid.*

[38] *Ibid.*

[39] *Official Records of the General Assembly, Third Session, Part I, Third Committee*, 154th meeting, p. 660.

[40] *Ibid.*, 177th meeting, p. 871.

dilemma had, in fact, been faced at earlier stages of preparing the draft covenant.

81. Much of the discussion during the fifth session of the Commission on Human Rights centred on the question of limitations to the provisions of the draft. Some representatives, fearing that a long list of limitations might weaken the force of the covenant, favoured a single over-all limitations clause. Others felt that Governments, when depositing their ratifications, should be allowed to make those reservations necessary to avoid conflict between their municipal legislation and the provisions of the covenant. Still others argued that the covenant would be stronger if limitations were set forth in specific detail.

82. The draft covenant, with its new revisions and its list of proposed limitations, was sent out following the fifth session of the Commission on Human Rights to Member States for study and comments. At its sixth session, the Commission gave careful consideration to the draft covenant, together with the comments and the proposals Governments had submitted.

83. A number of articles in the substantive part of the draft covenant contained limitations and restrictions. Moreover, article 2 in the first part allowed States parties to the covenant to derogate from their obligations in case of emergency or public disaster "to the extent strictly limited by the exigencies of the situation". However, even that escape clause was specifically exempted from application to rights guaranteed under certain articles. The right to life, to freedom from torture, to freedom from arbitrary arrest, imprisonment for debt and conviction under *ex post facto* law, to recognition as a person before the law, to freedom or thought, conscience and religion—those rights might under no circumstances be abrogated by any party to the covenant.

84. The enactment of an international bill of human rights was completed only on 16 December 1966, when by its resolution 2200 (XXI) the General Assembly adopted the two International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights.

2. Article 4 of the International Covenant on Economic, Social and Cultural Rights

85. Article 4 of the International Covenant on Economic, Social and Cultural Rights reads as follows:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

86. At its seventh session, in 1952, the Commission on Human Rights had before it the following proposal for a general limitations clause referring to the part of the draft covenant which related to economic, social and cultural rights:[41]

> Each State Party to the Covenant recognizes that in the enjoyment of those rights provided by the State in conformity with this Part of the Covenant, the State may subject such rights only to such limitations as are determined by law and solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[42]

87. In the course of the debate, that text was amended on the basis of several oral proposals. The text adopted by the Commission [43] did not undergo any changes either at the eighth session of the Commission (1952)[44] or at the seventeenth session of the General Assembly (1962), when it was examined and adopted by its Third Committee.

88. Two questions were discussed in connection with that article: whether there was any need to include a general limitations article in the covenant and, if so, whether the contents of article 4 were adequate or should be expanded.

89. The following arguments were submitted against the inclusion of such an article or its expansion: (*a*) an article on general limitations was superfluous, since the provisions of the draft covenant on economic, social and cultural rights were already limited by article 2, which provided, *inter alia*, that each State party to the covenent undertook to take steps, individually and through international assistance and co-operation, with a view to "achieving progressively the full realization of the rights recognized in the Covenant"; (*b*) general limitations would be open to varying interpretations and would tend to weaken or destroy the binding force of the provisions of the covenant; (*c*) the articles as drafted did not guarantee rights but merely recognized them in broad terms; (*d*) the nature of the obligations imposed and the manner of enunciating the rights made limitations generally unnecessary, except in certain cases, such as that of the article on trade union rights (art. 8).

90. In support of retention of the article, it was pointed out that: (*a*) the various substantive articles were drafted in broad general terms and States would themselves have to regulate and determine the scope of the rights within that general framework; nevertheless, some indication was required of the limitations that might be imposed, so that States would not be free to limit the rights arbitrarily in any manner they might choose; (*b*) such a limitations clause should not be drafted too generally or too restrictively; (*c*) the provisions of article 2 related only to the general level of attainment of rights and should not be invoked by States Members of the United Nations. The following March, the Drafting Committee met again, having before it the draft covenant as well as a number of States as grounds for imposing numerous limitations on them; (*d*) article 2 did not indicate when limitations could be legitimate and it was necessary to state clearly that limitations would be permissible only in certain circumstances and under certain conditions; (*e*) with respect to articles on civil and political rights the case was different: some of those articles contained no limitations while others contained specific limitations. It was not feasible to treat economic, social and cultural

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[41] At that time, it had not yet been decided that there should be two separate covenants.

[42] E/CN.4/610/Add.2.

[43] *Official Records of the Economic and Social Council, Thirteenth Session, Supplement No. 9* (E/1992), para. 55 and annex I, art. 32.

[44] *Ibid., Fourteenth Session, Supplement No. 4* (E/2256), paras. 155–160 and annex I A, art. 4.

rights in the same way, since the manner in which the articles were drafted was different.

91. In favour of the expansion of article 4, through adoption of the approach followed in the proposal quoted in paragraph 86 above, it was said that a reference to respect for the rights and freedoms of others and to the just requirements of morality and public order was an absolute necessity for harmonizing the rights of the individual, on the one hand, and the requirements of the life of the community, on the other.

92. In reply, it was observed that the covenant established merely the necessary minimum and that such considerations as morality, public order and the rights and freedoms of others were more relevant to civil and political rights than to economic, social and cultural rights. Moreover, the question of the rights and freedoms of others was fully covered in paragraph 1 of article 5. It was feared that States might invoke allegedly acquired rights in order to thwart implementation of the right of peoples to self-determination and to the control of their natural resources. Concepts such as public order or the prevention of disorder, which were open to broad interpretations, might easily nullify the whole concept of self-determination.

93. Against this view, it was said that the difficulty arising out of a possible conflict between such limitations and the provisions of paragraph 3 of article 1 on the right of all peoples and nations to self-determination was an argument not so much against a general limitations clause as against the article on the right to self-determination.

94. According to one view expressed during the discussion of the article in the Commission on Human Rights, its provisions would not protect individuals against any trespass on their rights that might be committed by other individuals, nor did it afford to individuals protection against measures the State might introduce to their detriment. The article was, it was said, unsatisfactory from a legal point of view; it should have followed the careful and balanced wording of article 29 of the Universal Declaration rather than amending it.

95. In the Third Committee, however, it was generally felt that the article adequately expressed the essential idea that arbitrary limitations on the rights recognized in the covenant should not be allowed. Nevertheless, according to one point of view, the expressions "in so far as this may be compatible with the nature of these rights" and "democratic society" were obscure and raised difficulties of interpretation.

C. Comments by Governments relating to limitations on the exercise of human rights and fundamental freedoms

96. The Secretary-General, on behalf of the Special Rapporteur, transmitted to Governments a questionnaire in connection with the present study. The following information relating to limitations on the exercise of human rights and fundamental freedoms is extracted from the replies of Governments:[45]

AUSTRIA

[*2 April 1976*]

(1) Respect for the rights of other individuals is an essential and inherent limit on the exercise of fundamental rights.

(2) The system of fundamental laws is restricted by innumerable laws enacted by making use of the legal reservation added to fundamental rights. Their enumeration is not possible.

(3) Mention should be made, in the context of limitations on human rights, of the jurisprudence of the Austrian Constitutional Court to the effect that limitations on fundamental rights must not in any case jeopardize the essence of those rights.

(4) Under the Austrian legal system, interference with fundamental rights is permissible only pursuant to a law which, in turn, must not jeopardize the essence of, or be inconsistent with, fundamental rights.

(5) Interference with human rights which has no legal basis or is based on an unconstitutional law (regulation) is unconstitutional. It should be added that every act of the administrative authorities is required to have a legal basis.

(6) Appeals against acts by administrative authorities can be lodged with the Constitutional Court on the grounds of alleged violation of constitutional rights.

(7) In connection with the procedures for declaring unconstitutional the limitations on or the derogation from human rights and freedoms, it should be noted that the protection is twofold: (*a*) abstract control of norms, i.e. examination of a law for its constitutionality, at the request of the Federal Government (where a provincial law is concerned) or at the request of a provincial government (where a federal law is concerned) as well as at the request of a court of last instance; (*b*) control of norms in a given case, i.e. examination of the law applied while considering a specific appeal.

(8) The individual has the possiblity of lodging an appeal with the Constitutional Court in accordance with article 144 of the Austrian Federal Constitutional Law. Thereafter, he is free to submit an application to the European Commission of Human Rights as provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

BARBADOS

[*31 October 1975*]

(1) Sections 11–27 of the Constitution deal with the rights and freedoms of the individual and state that they are subject to respect for the rights and freedoms of other and the public interest.

(2) Section 12, subsection (1), of the Constitution reads: "No person shall be deprived of his life intentionally, save an execution of the sentence of a court in respect of a criminal offence under the law of Barbados of which he has been convicted." Section 12, subsection (2), reads:

> "A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use . . . of such force as is reasonably justifiable:
>
> "(*a*) for the defence of any person from violence or for the defence of property;
>
> "(*b*) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> "(*c*) for the purpose of suppressing a riot, insurrection or mutiny; or
>
> "(*d*) in order lawfully to prevent the commission by that person of a criminal offence,
>
> or if he dies as the result of a lawful act of war."

(3) Section 13 stipulates that no person shall be deprived of his personal liberty save as may be authorized by law in any one of 10 cases, which are listed. Section 13, subsection (5), is of special interest. It authorizes the Executive to deprive an individual of his liberty in times of public emergency, where this is reasonably

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[45] The dates of the replies from Governments are shown in parentheses after the names of the countries, which are listed in alphabetical order.

justifiable for the purpose of dealing with the situation. That power is, however, subject to certain restraints, which are listed in subsection (6).

(4) Section 14 protects the individual from slavery or servitude, but recognizes four limitations on the right to such protection.

(5) Section 15, subsection (1), provides that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. Subsection (2) provides that nothing in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 15 to the extent that the law in question authorizes the infliction of any punishment or the administration of any treatment that was lawful in Barbados immediately before 30 November 1966. The lawful forms of punishment in Barbados prior to that date included: (*a*) death by hanging in case of murder; (*b*) imprisonment for life or for a term of years; (*c*) corporal punishment, which consisted of no more than 12 strokes of the birch in the case of an offender under 16 years of age or 24 strokes in the case of an offender over 16 years of age. The punishment of flogging could not be inflicted on a person more than once.

(6) The right to hold property and to protection against being deprived thereof is covered by section 16. This right is not absolute; limitations on it are mentioned in subsection (2) of the section. Section 17 states: "Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises". The exceptions to this right are substantial in nature and wide in terms.

(7) Section 19 seeks to protect freedom of conscience as enunciated in article 18 of the Universal Declaration of Human Rights. Subsection (6) lists three exceptions to the right of freedom of conscience.

(8) The right to freedom of opinion and expression embodied in article 19 of the Universal Declaration is covered by section 20 of the Constitution of Barbados. The circumstances in which derogations from this right are possible are mentioned in subsection (2) of section 20.

(9) Section 21 seeks to protect freedom of assembly and association (article 20 of the Universal Declaration). The limitations on this freedom are set forth in subsection (2) of the section.

(10) Section 22 of the Constitution embodies the rights enunciated in article 13 of the Universal Declaration. The conditions in which derogation from these rights is possible are mentioned in subsections (2) and (3) of the section. The Public Order Act, chapter 168A of the Laws of Barbados, 1971, is also relevant. This Act contains provisions restricting and regulating the right of assembly and the right relating to freedom of speech.

(11) All rights are subject to derogation in Barbados, as outlined above.

(12) The principles governing the limitation and restriction of human rights and freedoms in Barbados are largely to be found in the Constitution, as set out above, and in the Public Order Act.

(13) Subsections (1) and (2) of section 23 of the Constitution read:

"(1) Subject to the provisions of this section:

"(*a*) no law shall make any provision that is discriminatory either of itself or in its effect; and

"(*b*) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

"(2) In this section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not afforded to persons of another such description."

(14) Hence, one principle governing the limitation of human rights is that the laws and human rights guaranteed by the Constitution are to be administered on a non-discriminatory basis.

(15) Rights and freedoms, and derogations therefrom, are to be administered according to the rule of law. Section 24 of the constitution and rules made thereunder provide a channel for the enforcement of provisions relating to human rights.

(16) The question arises whether the Constitution contains the basic provision that the national law shall not be such as to impair the guarantees for the protection of human rights and freedoms provided for in the Constitution. The answer is that section 1 declares that the Constitution is the supreme law of Barbados and that, subject to the provisions of the Constitution, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

(17) However, the Constitution expressly preserves existing laws providing for derogations from human rights. Mention may be made, in this connection, of section 15, subsection (2); section 16; section 17, subsection (2); and section 18, subsection (11), of the Constitution. Furthermore, section 26 expressly preserves the law existing in Barbados before 30 November 1966, the date on which Barbados attained its independence.

(18) Under the Public Order Act, the powers given to the Commissioner of Police to refuse the right of assembly in a public place are circumscribed. Section 5, subsection (1), states that he must not refuse an application for a permit unless there are reasonable grounds for apprehending that the meeting in respect of which the application is made may occasion a breach of the peace or serious public disorder.

(19) The Constitution provides, in section 49, that chapter III, which contains the provisions relating to human rights, may be altered by the legislation if, at the final voting in each House of Parliament, the amendments are supported by the votes of not less than two thirds of all the members of the House.

(20) The executive and administrative authorities may not impose limitations other than those given them by law sanctioned by the Constitution.

(21) Section 24 of the Constitution sets up the judical machinery to deal with the enforcement of protective provisions.

BOLIVIA

[*27 October 1975*]

(1) In accordance with the Political Constitution of the State of Bolivia, every person enjoys fundamental rights as follows: no person shall be arrested, detained, or imprisoned, except in the cases and according to the forms established by law; no person shall be placed in solitary confinement except in cases of the utmost gravity; all kinds of torture, coercion, extortion or other form of physical or moral violence shall be prohibited; no person shall be tried by special commissions or submitted to judges other than those previously designated for the case in question; no person shall be obliged to testify against himself in a criminal case; any person charged with an offence shall be presumed innocent until proved guilty; the right to defence of any person brought to trial shall be inviolable; from the time of his arrest or detention, any person who is detained has the right to defence counsel; no person may be condemned to any punishment without having first been heard and judged in legal proceedings; the sentence shall be final and handed down by a competent authority; punishment by disgrace or by loss of civil rights shall not exist; the right of habeas corpus and the right of *amparo* under the Constitution shall be recognized in cases of unlawful prosecution and detention of persons who have been put on trial or arrested and in cases of illegal acts or omissions by officials or private individuals which restrict, eliminate or threaten to restrict the rights and guarantees of the individual.

(2) Consequently, the intrinsic rights and duties of every person are those which the Constitution recognizes for the individual in his capacity as a free member of society, subject only to the limitations imposed by public order and the general welfare, according to the law.

(3) It is also necessary to state that, in every free society governed by the rule of law, the function of the authorities of the State is to establish and maintain conditions in which the dignity of every person is recognized. In accordance with this principle, and in view of the country's need to achieve its economic potential in order to defend domestic peace and national sovereignty against constant internal struggles for political domination by various factions, the national Government is making every effort to do away with factors which impede progress towards a new stage of rapid economic and social development, with the sole desire of overcoming the country's backwardness and transforming its social and economic structure.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[28 April 1976]

(1) In the Byelorussian Soviet Socialist Republic, relations between the citizen and the socialist State are imbued with a spirit of mutual respect, trust and co-operation, as well as mutual responsibility.

(2) This reflects the fact that the State serves all the people and that its fundamental interests coincide with those of its citizens. In possible conflicts between social and personal interests, the conscientious citizen will give preference to social interests, realizing that they comprise the common interest of society and the State as a whole. The fulfilment of his personal requirements depends on the successful satisfaction of the general interest.[46]

ECUADOR

[28 August 1975]

(1) The fundamental rights guaranteed by the Constitution and the laws are subject to two limitations: the holding of private property must always be consistent with social objectives; and censorship must be applied to public information media when national security so requires.

(2) All the international instruments concerning human rights to which Ecuador has acceded are laws of the Republic which, because they are deemed to be special laws, prevail over any other legal provisions that may conflict with them. Consequently, the courts and tribunals observe and apply those instruments whenever their implementation is relevant.

(3) It should also be noted that article 165 of the present Constitution of Ecuador provides: "Only the Congress may declare whether an act, decree, regulation, agreement, order, provision, covenant or public treaty is constitutional or not, or interpret the Constitution and laws in a manner that is generally binding, without prejudice to the functions of the Supreme Court as regards the unification of binding jurisprudence, in accordance with the law."[47]

GERMAN DEMOCRATIC REPUBLIC

[13 October 1976]

(1) The manner in which the basic rights of citizens are protected and elaborated in the German Democratic Republic takes full account of the provisions of article 29 of the Universal Declaration of Human Rights. In fact, the Constitution of the Republic explicitly provides that in the exercise by citizens of their rights and freedoms, limitations for the purpose of meeting the requirements of security and protection of the State are permissible only on the basis established by law (cf. art. 30). Therefore, the legislation of the German Democratic Republic, particularly on the constitution of courts and on criminal procedure, contains concrete and explicit provisions and court guarantees to secure due recognition and respect for the basic rights of citizens and for legality.

(2) A person may not be imprisoned (cf. sects. 340 ff. of the Penal Code) until convicted by final judgement passed by a court which has inflicted a penalty involving imprisonment. The rights of convicts serving sentences are subject only to such limitations as are permissible on the basis established by law. The principles of justice, equality and respect for human dignity apply fully to the execution of sentences.

GERMANY, FEDERAL REPUBLIC OF

[3 June 1976]

(1) The word "duties" used in article 29 of the Universal Declaration of Human Rights indicates that human rights may be restricted by legally prescribed duties. However, this by no means applies to all human rights. Thus the right not to be tortured or inhumanly treated may not, for example, be restricted by the duty to make a truthful statement to the police or a court. One remarkable point is that an article corresponding to article 29 of the Universal Declaration was not included in the International Covenants on Human Rights of 16 December 1966. The only general reference to the duties of the individual vis-à-vis his fellow human beings and the community is set out in the preambles.

(2) The duty to respect the rights and freedoms of other individuals and groups may lead to limitations on certain human rights. The idea that every human right is linked to a correlative human duty is a fallacy. On the contrary, the individual's human rights are matched by the duty of the State and the community to respect and protect those human rights.

(3) The fundamental rights guaranteed in the Basic Law of the Federal Republic of Germany are binding on the legislature, the executive and the judiciary as directly valid law (art. 1, para. 3). Restrictions on fundamental rights are only permissible in pursuance of the Basic Law and are thus subject to narrow preconditions. In so far as the Basic Law provides that certain fundamental rights may be restricted by legislation or by virtue of a specific law, this law must be of general application and not enacted solely for an individual case (art. 19, para. 1). In no case may a fundamental right be restricted in its essential nature (art. 19, para. 2).

(4) The Basic Law provides for restrictions in the interest of various community assets and for the protection of the rights of others.

(5) The fundamental right to the free development of one's personality, for instance, is limited by the need not to infringe upon the rights of others or offend against the constitutional order or the moral code (art. 2, para. 1). Under article 2, paragraph 2, the fundamental right to life, physical inviolability and personal freedom may be interfered with only on the basis of a law which respects the decision of the Constitution on the value of those elementary legal rights and which accords with the principle of commensurability. Only a judge may decide on the admissibility and the duration of imprisonment (art. 104, para. 2). The limits imposed by the Basic Law in regard to freedom of speech are derived from the provisions of general law, the legal regulations for the protection of juveniles and the "right to personal honour" (art. 5, para. 2). The fundamental right to assemble unarmed and peacefully without prior notification or permission may be restricted by legislation or on the basis of a law in the case of open-air meetings (art. 8, para. 2). The fundamental right to form associations and societies applies, notwithstanding the prohibition on associations whose aims or activities conflict with the Penal Code or which are directed against the constitutional order or the concept of international understanding (art. 9, para. 2).

(6) Further examples of restrictions are the limitations that may be imposed, subject to certain preconditions, on the inviolability of private correspondence, postal consignments and telecommunications, on the right to freedom of movement and on the right to inviolability of one's home (see, respectively, art. 10, para. 2, art. 11, para. 2, and art. 13, para. 3). In the case of military conscripts, certain fundamental rights (such as the basic right to freedom of association) may in principle be restricted.

(7) It is clear from the observations set out above that in many respects the Basic Law reflects the fact that the basic guarantees contained in it are subject to limitations. These limitations may be inherent in basic laws and thus derive from the guarantee of individual freedoms as such. However, the limitations may also stem from the fact that in the Constitution each fundamental right is accompanied by a legal qualification which enables the legislator to define the limits of basic rights more precisely or to effect restrictions on them. All such limitations on basic rights are designed to help establish a proper relationship between the individual rights and the rights of others and other legal rights recognized by the Constitution.

(8) The Federal Constitutional Court has, in numerous decisions, established essential criteria for determining the bounds within which the legislator must keep when he embarks on a limitation of fundamental rights. The Court has stressed, for instance, that a law permitting an encroachment on a basic right must be viewed in the light of the significance of that basic right (*inter alia*, the resolution of 25 July 1963[48] on the permissibility of body searches of an accused in a case of criminal proceedings). This is also manifest to a substantial degree within the framework of the basic right of freedom of speech. "It accords with the established practice of the Federal Constitutional

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[46] The replies of the Governments of the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socalist Republic and the Union of Soviet Socialist Republics, reproduced in the present section, are almost identical in relation to this point.

[47] The Constitution of Ecuador on which these comments were based is no longer in force. A new Constitution went into effect in 1979.

[48] *Entscheidungen des Bundesverfassungsgerichts*, vol. 17, pp. 108–117.

Court that "general laws" forming the limits to a fundamental right must always be interpreted on the basis of recognition of the indicative significance of that particular right for a free democratic State (see, for example, the resolution of 28 April 1970).[49] In other words, a legislator who enacts statutes in an area of life protected by a basic right is not free to determine the substance of that basic right. The content of the fundamental right may lead to a limiting in substance of the legislator's scope of action. In principle, the legislator must observe the principle of commensurability when limiting basic rights. The encroachment may go no further than is necessitated by the purpose for which it took place, and at the same time the significance of the given basic right must be taken into account. The judgement of 12 December 1973[50] states that the personal freedom guaranteed by article 2, paragraph 2, sentence 2, of the Basic Law as the basis of a citizen's general legal position and scope for development occupies a high position among basic rights. For this reason, the imprisonment of an accused may only be ordered and upheld by virtue of a law if the overriding interests of the common weal render this imperative.

(9) The interests of the common weal, which in certain circumstances must take precedence over an accused's right to freedom, include the essential requirements of an effective prosecution.

(10) Any limitations on basic rights which affect human dignity are unlawful in the Federal Republic of Germany. According to the Basic Law, the dignity of man is inviolable (art. 1, para. 1). Even very important State or social interests have to accord precedence to human dignity. No derogations from the right to human dignity can be made. For this reason, the prohibition of torture or inhuman punishment or treatment does not admit of any restrictions. In particular, arrested or detained persons may not be physically or psychologically mistreated (art. 104, para. 1).

(11) No limitations may be imposed on the prohibition of slavery and servitude or on the rights of equal treatment in law. The prohibition of the death penalty (art. 102) is a special manifestation in the Federal Republic of Germany of the right to life. Furthermore, the provision of article 2, paragraph 2, of the European Convention on Human Rights are also applicable, as this article only permits killing for special reasons.

(12) The most important principle to be considered in regard to basic rights and human freedoms in the Federal Republic of Germany is that no basic right may be infringed in regard to its essential nature. Importance also attaches to the principle that legally permissible restrictions may go no further than is absolutely essential to achieve the given purpose and that they must be commensurable with that purpose. This follows from the "principle of commensurability" which has constitutional status and whose observance may be verified by the courts. Article 18 of the European Convention on Human Rights enunciates the general principle that restrictions on human rights may not be applied for any other purposes than those envisaged in the Convention.

(13) In principle, human rights are not able to develop their full value and effectiveness until they are directly applicable under national laws and individuals can take action in independent courts against their violation. This presupposes that legal or administrative measures may be examined by a court with a view to determining whether they unlawfully limit basic rights.

(14) Pursuant to the Basic Law, it is assumed as a matter of course that the principles of the rule of law, equality and non-discrimination have to be taken into consideration in cases where basic rights are restricted. In principle, limitations on the exercise of basic rights have to remain within the scope of the criteria mentioned above.

(15) Anyone whose rights have been infringed by public authorities may initiate legal proceedings (art. 19, para. 4). If the possibilities of legal remedy have been exhausted, anyone can submit a "constitutional complaint" to the Federal Constitutional Court on the grounds that the public authorities have infringed one of his basic rights (art. 93, para. 1, in conjunction with art. 100, para. 1).

(16) Accordingly, there is also a substantial body of established law and practice on the legality and scope of permissible restrictions. Reference has already been made to the criteria developed in the jurisprudence of the Federal Constitutional Court. Reference should also be made at this stage to that Court's decision of 24 February 1971.[51] This concerned the question whether the act committed by a publishing house in distributing Klaus Mann's book, *Mephisto, the Novel of a Career*, constituted such a serious encroachment on the private life of the deceased actor and stage director *Gustav Gründgens* and his adopted son, as protected by article 1, paragraph 1, of the Basic Law, as to justify, on constitutional grounds, a court order prohibiting the reproduction, marketing and publication of the novel, irrespective of the freedom of artistic expression guaranteed under article 5, paragraph 3, of the Basic Law. In its decision, the Federal Constitutional Court came to the conclusion that a clash between the guarantee of artistic freedom—which in itself is free from any limitations—and the constitutionally protected right to privacy should be resolved by reference to the scale of values contained in the Basic Law.

(17) The Federal Constitutional Court has come to a number of decisions in which legal provisions have been declared null and void because they restricted a basic right beyond the extent permitted under the Constitution. For example, in its judgement of 11 June 1958,[52] it declared a provision in the Bavarian Apothecaries Law—whereby the establishment of any new dispensing chemist's shop had to be examined in the light of the actual need for such an enterprise before it could be registered—to be incompatible with the basic right of professional freedom (art. 12, para. 1).

(18) In its judgement of 4 April 1967,[53] the Court had gone into the question whether the freedom of the press also extended to the advertising section of a newspaper. It answered this question in the affirmative and declared article 37, paragraph 2, sentence 3, of the Law on Employment Agencies and Unemployment Insurance to be null and void because its prohibition of the publishing of available vacancies for jobs abroad infringed the basic right of the freedom of the press. A resolution of 7 July 1971[54] dealt with the limits of a permissible definition of the content of property pursuant to article 14 of the Basic Law. Article 46 of the Copyright Law was declared to be incompatible with article 14, paragraph 1, sentence 1, of the Basic Law, inasmuch as the provision permitted the gratuitous inclusion of copyright works in collections intended for use in churches, schools and teaching establishments.

(19) The legislators are to a certain extent entitled to restrict basic rights and freedoms. As described above, the pre-conditions and limits for this follow from the Basic Law. The legislators are bound by the constitutional system (article 20, paragraph 3, of the Basic Law) and must thus respect the precedence enjoyed by the Constitution.

(20) Encroachments by administrative authorities on basic rights have to be based on law. The democratic principle of the legitimacy of administrative bodies is applied. Needless to say, administrative measures have to remain within the bounds of the law, just as the law has to respect the Constitution.

(21) The independent courts of the Federal Republic of Germany exercise comprehensive control over the acts of executive and administrative authorities in the exercise of their power to impose limitations on human rights and freedoms.

(22) The Federal Constitutional Court can declare legal norms to the contrary to the Constitution and therefore null and void. An appeal may also be made to that Court, subject to certain pre-conditions, in respect of administrative acts which encroach upon basic rights.

(23) If a person believes that his human rights and freedoms and being arbitrarily or unlawfully restricted and no remedy is found for such restriction within the framework of national legislation, he may have recourse to the international means available for protecting individual legal rights and for investigating abuses.

(24) In pursuance of articles 25 and 46 of the European Convention on Human Rights, the Federal Republic of Germany has recognized the competence of the European Commission of Human Rights and the European Court of Human Rights in Strasbourg to handle individual complaints. This means that anyone who feels aggrieved by an infringement of the rights recognized in the European Convention on Human Rights may appeal to the European Commission of Human Rights. Individuals are also entitled, under resolution 1503 (XLVIII) of the United Nations Economic and Social Council, dated 27 May 1970, to make an application to the Secretary-General of the United Nations on the grounds of an infringement of human rights. So far, the Federal Government has replied to all communica-

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[49] *Ibid.*, vol. 28, pp. 191–202.

[50] *Ibid.*, vol. 36, pp. 264–269.

[51] *Ibid.*, vol. 30, pp. 173–191.

[52] *Ibid.*, vol. 7, p. 377.

[53] *Ibid.*, vol. 21, p. 271.

[54] *Ibid.*, vol. 31, p. 229.

tions on this subject which it has received from the Secretary-General.

(25) Moreover, anyone in the Federal Republic of Germany may, either individually or together with others, submit a written petition containing requests or complaints to the competent authorities and to his representative body (art. 17 of the Basic Law).

(26) In addition, the free press and other media enjoy an important "supervisory role" in a pluralistic, democratic society. These media can draw attention to abuses and infringements of human rights and thus guard against arbitrary acts.

(27) Respect for the rights and freedoms of others is one of the most important limitations on the exercise of one's basic rights. It stems from the knowledge that the individual and his human rights cannot be viewed in isolation. Everyone must realize that the human rights of others are no less worthy of protection than his own. Thus, the right to freedom of speech, for example, does not entitle a person to insult or slander others.

(28) The International Covenants on Human Rights (for example, articles 21 and 22 of the International Covenant on Civil and Political Rights) and the European Convention on Human Rights (arts. 8-11) make reference to the permissibility of various limitations on "democratic societies". Only a democratic society provides adequate guarantees that the permissible reasons for limitations are not misused to oppress persons or suppress opinion and meetings. The interests of national or public security and public order (*ordre public*) are only too easily confounded in a dictatorially governed society with an interest in maintaining a dictatorship. Past experience has shown that the right to hold peaceful meeting and demonstrations (article 21 of the above-mentioned International Covenant) is subject in such societies to prohibitions and limitations which would not be permissible in a democratic society.

(29) As individuals do not live in isolation, they must not only respect the rights and freedoms of others, but also take into account the generally accepted moral code. The substance of such public morals may differ from people to people and State to State and also in the various regions of the world; moreover, it is subject to a process of historical change. The possibility of imposing limitations on human rights in regard to morals must, however, to kept within reasonable bounds because of the danger of the abuse of such vague terms.

(30) The Federal Republic of Germany cannot say whether the expressions "public order" and "*odre public*", which are given equal status in the International Covenant on Civil and Political rights, are completely identical. At all events "*ordre public*" should not be interpreted as an abstract concept but in the light of the purpose of the human right which is restricted by the reference to "*ordre public*". The right to freedom of movement (article 12 of the International Covenant), for example—and especially freedom to leave the country—should not be made dependent on the fulfilment of financial pre-conditions in general and the payment of a certain sum of money in particular.

(31) Only in the International Covenant on Economic, Social and Cultural Rights does "general welfare" constitute the basis for imposing limitations on the human rights listed therein (art. 4). The International Covenant on Civil and Political Rights does not contain a comparable general clause because of the vagueness of such a clause and the concomitant danger of abuse. Nor is it clear what human rights in this Covenant could be restricted for reasons pertaining to "economic and social development". The International Covenant on Civil and Political Rights only provides for exemptions in the event of a public emergency (art. 4).

(32) So far as the protection of public health is concerned, the International Covenant on Civil and Political Rights affords sufficient opportunities for imposing limitations (see, for example, articles 18, 19, 21 and 22), so that special, more extensive "protection of the human environment" no longer seems necessary in this Covenant.

(33) International Covenants on Human Rights also provide adequate possibilities for the imposition of limitations in the interests of national security and public safety. As exemption clauses, all such limitation provisions should in principle be narrowly interpreted.

(34) Mention is made in the Basic Law of general welfare as a reason for imposing a limitation on the exercise of basic rights in connection with the protection of property. Article 14, paragraph 3, states that expropriation is permissible only for the welfare of the general public and in return for compensation.

(35) There exists a substantial body of judical decisions and court practice relating to the terms "the rights and freedoms of others", "morality" ("morals"), "public order", "general welfare" and "public safety". Mention need only be made as an example, of the Federal Constitutional Court's decision in the "Mephisto" case, to which reference has already been made (see para. (16) above). In that judgement, the right to personality ("rights and freedoms of others"), which is protected by article 1, paragraph 1, of the Basic Law, is set against the freedom of artistic expression guaranteed under article 5, paragraph 3, of the same Law. A closer definition of the concept of "general welfare" referred to in article 14, paragraph 2, of the Basic Law is, for example, to be found in the Federal Constitutional Court's judgement of 23 April 1974.[55] Moreover, the concept of general welfare in principle plays a fundamental role in the Federal Constitutional Court's jurisprudence in interpreting and imposing permissible limitations on basic rights. The criterion for determining the constitutionality of legal provisions relating to the exercise of a profession is, *inter alia*, that encroachment on basic rights "may be justified by pertinent and reasonable considerations of general welfare" (see, for instance, the ruling of 16 March 1971[56] on the statutory requirement incumbent on private enterprises to stockpile mineral oil products).

(36) The Federal Republic of Germany is a party to the International Covenant on Civil and Political Rights and the European Convention on Human Rights, both of which contain "public emergency" articles (art. 4 of the Covenant and art. 15 of the Convention). The emergency measures permissible under the Basic Law (arts. 12*a* and 115c, para. 2) do not exceed those permissible under the "public emergency" articles in the International Covenants.

(37) In a defensive emergency, too, the constitutional position and the fulfilment of the constitutional functions of the Federal Constitutional Court and its judges may not be impaired (art. 115*g*).

(38) Article 30 of the Universal Declaration of Human Rights which, unlike article 29, was included in the substantive part of the International Covenant on Civil and Political Rights (art. 5), confirms the view that human rights taken together constitute an objective scale of values. For this reason, any acts which are directed against this scale of values do not deserve to enjoy the protection afforded by the Covenant. An example may be found in article 20 of the International Covenant on Civil and Political Rights, according to which propaganda for war and advocacy of national, racial or religious hatred do not enjoy the protection afforded to the right of free speech by the provisions of article 19. They must be prohibited. This is also in conformity with the provisions of article 29, paragraph 3, of the Universal Declaration of Human Rights. The community of nations must prevent the use of human rights as a pretext for discrediting the scale of values governing such rights. This excludes any dual morality in the sector of human rights.

(39) Article 5 of the International Covenants on Human Rights has the same meaning as article 30 of the Universal Declaration of Human Rights, inasmuch as it, too, contains an explicit and binding interpretative rule in the sense of an absolute guarantee of the substance of human rights. Hence the interpretative rule in article 5 prohibits any unreasonable interpretation of the limitations on human rights envisaged in, for instance, articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, and articles 4, 12, 14, 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights.

GHANA

[*30 September 1975*]

(1) Article 15 of the 1969 Constitution guarantees the individual's right to his personal liberty except as may be authorized by law in certain specific cases, for example, by restriction of his freedom in execution of a court sentence or order. The individual's rights and freedoms enumerated in article 12 are "subject to respect for the rights and freedoms of others and for the public interest". Article 16 provides as follows:

> "(1) No person shall be held in slavery or servitude.
>
> "(2) No person shall be required to perform forced labour."

Under article 17, no person shall be subjected to torture or inhuman or degrading punishment or any other condition that detracts or is likely to detract from his dignity and worth as a human being.

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[55] *Ibid.*, vol. 37, p. 132.

[56] *Ibid.*, vol. 30, pp. 292-316.

(2) Under section 2 of the Preventive Custody Decree (NRCD 2), the National Redemption Council may, by executive instrument, authorize the arrest and detention of any person in respect of whom they are satisfied that it is in the interest of national security or in the interest of the safety of the person so to do.

(3) Before the suspension of the 1969 Constitution, an individual who had been unlawfully detained could file a writ of habeas corpus for his release. At present, however, his only remedy is to petition the Head of State for his release. The human rights provisions have been suspended; persons who feel aggrieved send petitions direct to the Head of State or to the Attorney-General and Commissioner for Justice.

GREECE

[4 May 1976]

(1) In accordance with article 25.3 of the Constitution, abusive exercise of human rights is not permitted. This limitation is of great importance, in particlar in respect of the right to form or join trade unions and the right of everyone to participate in labour struggles, that is to say, in a strike or in strike-breaking. There would be an abusive exercise of this right if a political strike or any other labour struggle was carried out for a purpose other than to safeguard and improve working and economic conditions. On that point, the Supreme Court of Greece has declared[57] that to strike is a right of the workers in order to safeguard and improve their financial and general labour interests, but this is subject to the limitations provided for by the Constitution and by article 281 of the Greek Civil Code, namely that exercise of the right to strike must not be obviously contrary to good faith (*bona fides*), or to the financial and social scope of the right.

(2) In connection with the fundamental principle of equality, which is included in, *inter alia*, the Universal Declaration of Human Rights, the United Nations Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenants on Human Rights, and the European Convention on Human Rights, as well as in the Constitution of Greece (arts. 4.1, 4.2, 5.1 and 5.2), the Council of State in its judgements[58] has stated the following: a constitutional provision referring to the principle of equality is not a simple guideline or recommendation, but a strict provision of vital importance, which imposes on the judicial authority the obligation to find out if the legislature has applied the principle of equality of individuals and to pronounce, in cases of violation of this clause, that the laws which have violated the principle of equality should not be imposed.

(3) Article 7.2 of the Constitution states: "Torture, any bodily maltreatment, impairment of health or the use of psychological violence, as well as other offences against human dignity are prohibited and punished as provided by law." Article 7.3 provides: "General confiscation of property is prohibited. The death sentence shall not be imposed for political crimes, unless these are composite." The principle of equality is embodied, *inter alia*, in articles 4 and 5.

(4) The Constitution and many other legislative provisions also recognize the principle of legality, within the broad meaning of the term, and the principle of the rule of law.

(5) Further, article 7.1 of the Constitution provides for the prohibition of retroactive legislation. Thus the above-mentioned provision includes, *inter alia*, the following: "There shall be no crime, nor shall punishment be inflicted unless specified by law in force prior to the perpetration of the act, defining the constitutive elements of the act. In no case shall punishment more severe than that specified at the time of the perpetration of the act be inflicted."

(6) Article 12.2 of the Constitution provides that "an association may not be dissolved for violation of the law or of a substantial provision of its statutes except by court judgement."

(7) Also, article 18.5 (second subparagraph) reads: "Measures imposed in accordance with this paragraph shall be lifted as soon as the special reasons that required them shall have ceased to exist. In case of undue prolongation of the measures, the Council of State shall decide on their revocation, by categories of cases, upon recourse by any person having a legitimate interest.

(8) The Constitution provides for complete legal protection by the courts for every person.

(9) Thus, article 20 reads:

"1. Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law.

"2. The right of a person to a prior hearing shall also be enforced in any administrative action or measure adopted at the expense of his rights or interests."

(10) The concept "respect for the rights and freedoms of others" embodies protection either of the freedom of others or of the interests of the State. In other words, this limitation protects either the interests of the individual or the interests of other individuals or public interests. The meaning of this limitation is: no person infringing the rights of another individual can justify such infringement by invoking his own individual right, in particular against another individual or against the State.

(11) A democratic society is a society which respects human rights and fundamental freedoms, such as freedom of conscience, freedom of association, and the right to participate in political life at the local and national level by means of free elections, enabling citizens periodically to choose their own government.

(12) Articles 1 and 2 of the Constitution provide as follows:

"Article 1

"1. The form of the government of Greece is that of a parliamentary republic.

"2. Popular sovereignty is the foundation of government.

"3. All powers are derived from the people and exist for the people and the nation; they shall be exercised as specified by the Constitution."

"Article 2

"1. Respect for and protection of the value of the human being constitute the primary obligation of the State.

" . . . "

(13) The term "morality" or "morals" governs the whole internal legal order. Just as in civil law a legal act is null and void if it is against good morals (*contra bonos mores*) and just as a foreign law is not applicable in a country if its application is against the morals of that country, so no person can justify his immoral behaviour by invoking his individual human rights. Thus, in accordance with the provisions of the relevant constitutional, civil and penal codes and the judicial decisions based on those provisions, the exercise of a human right in violation of "morals" is not permitted.

(14) The principle of public law which corresponds to the principle of good faith in civil law is the principle of public order (e.g., article 13.2 of the Constitution). Thus, in a society of give and take, an individual has to behave in a manner imposed by good faith; similarly, in a society organized as a State, an individual has to behave in such a way that public order and public safety are not disrupted.

(15) The concepts of "general welfare", "public interest" and "public utility" should constitute the basis for the imposition of temporary limitations on certain human rights with a view to accelerating economic and social development or to protecting the human environment, human settlement or public health. Provision for this is made in many articles of the Constitution and other legislative instruments. For example, articles 17.1, 17.6, 18.1, 18.4, 18.5, 18.6 and 24.1 provide for the preservation of the environment.

(16) The provisions of article 30 of the Universal Declaration of Human Rights and article 5 of the International Covenants on Human Rights are of cardinal importance. They indicate the purpose which should govern the acts of a person or organ applying the law. These norms of interpretation are addressed to the individual, as the beneficiary of the rights and freedoms, and to the State, which must respect the beneficiary of the rights and freedoms, and to the State, which must respect the rights and freedoms but which may be obliged, under the provisions of article 29 of the Declaration and the corresponding articles of the International Covenants, to limit exercise thereof.

(17) In response to the request for comments on the advisability of the elaboration by the competent United Nations organs of international standards establishing a system of limitations, it would be

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[57] See Supreme Court judgement 296/1966, in *Ephimeris Ellinon Nomikon* (Journal of Greek Lawyers), vol. 34, 1966, p. 42.

[58] See, for example, Council of State judgements 140/1948, 1535/1948, 300/1950, in the Council of State Books of Jurisprudence, vols. 1948 and 1950 (in Greek).

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useful for the work of certain organs and bodies of the United Nations, in particular the working group established pursuant to Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970, the working groups of the Commission on Human Rights, and the Human Rights Committee established in accordance with the provisions of the International Covenant on Civil and Political Rights, as well as for national legislative, judicial and administrative authorities, to have available a well prepared and generally acceptable system of standards of limitations, determined by law, covering the exercise of certain human rights and freedoms. The fundamental object of establishing such a universal system of limitations should be the protection of human rights and freedoms and the prevention of the arbitrary imposition of limitations on human rights and fundamental freedoms by legislative and administrative authorities.

HUNGARY

[*21 July 1976*]

(1) The Constitution of the Hungarian People's Republic contains no express provisions on limitations on the exercise of human rights and freedoms. Such limitations are to be found in the following legislative provisions: Act II of 1972 on Health, paras 19 and 20; Act I of 1976 on National Defence, art 55; Decree No. 21/1953/V.15 of the Council of Ministers on the regulation of matters relating to animal health (imposing limitations on the freedom of movement of the population in the event of epizootic).

(2) Where there exist reasonable grounds defined by law, such limitation may be imposed by the organs of State administration vested with powers of decision in an emergency situation and in the interest of the community.

(3) Citizens in the Hungarian People's Republic have the right to the protection of life, corporal integrity and health (Constitution, art. 57, para. 1). This right is implemented through the organization of labour safety, health institutions and medical care, and by protection of the human environment.

(4) Offences against life, corporal integrity and health are punishable under the Criminal Code.

(5) Important relevant provisions are contained in articles 23, 43 and 44 of Act II of 1972 on Health.

(6) The most recent legislation includes among the rights of citizens the right to health care, which is extended to all Hungarian citizens (Act II of 1975 on Social Insurance).

(7) The Constitution contains no express provision to the effect that the national law shall not impair the constitutional guarantees for the protection of human rights and freedoms, since the Constitution is the basic law of the Hungarian People's Republic and, therefore, nothing contrary to its provisions can be sanctioned by law.

(8) The Constitution provides, in article 19, paragraph 1, that the highest organ of State authority and of popular representation in the Hungarian People's Republic is Parliament. Under paragraph 3, Parliament exercises control over the observance of the Constitution and annuls any measures of State organs that infringe the Constitution or are detrimental to the interest of society.

(9) Similarly, according to article 35, paragraph 3, of the Constitution, the Council of Ministers may annul or modify any regulation, decision or measure adopted by any organ subordinate to it, if such regulation, decision or measure is contrary to the law or detrimental to the public interest. It may annul any order or decision of the councils that is detrimental to the interests of society.

(10) It follows from the foregoing that Parliament and the Council of Ministers have the prerogative of annulling any regulation of the organs of State administration that violates human rights or offends against the law.

(11) In the cases defined by law, citizens shall have recourse to the court against decisions of the organs of State administration. Article 51 of the Constitution and Act V of 1972 on the Procurator's Office enable the procurator to initiate, upon complaint of the applicant or *ex officio*, the taking of new decisions by the superior organs of State administration to supersede any decisions of lower State organs that unlawfully derogate from human rights.

(12) All citizens of the Hungarian People's Republic have the right to lodge complaints with any organ of State administration.

(13) Concerning the protection of the human environment, reference may be made to Act II of 1976 on the Protection of the Human Environment, which, in article 2, paragraph 3, provides that every citizen shall have the right to live in an environment worthy of man. The Hungarian People's Republic also promotes the protection of the human environment through co-operation under international agreements (art. 8).

(14) Legislative provisions on the protection of human rights also provide for instruments to protect the rights of others (Constitution, art. 54, para. 2; Civil Code, arts. 4 and 5).

(15) Article 1 of Act I of 1974 on Family Law states it to be the purpose of the Act to regulate and protect the institution of marriage and the family, to secure, in marriage and in family life, the equal rights of the spouses, to increase responsibility for the child, and to promote the development and upbringing of young persons in pursuance of articles 15, 16 and 62 of the Constitution, and in accordance with the social order and the socialist morality of the Hungarian People's Republic.

(16) In certain cases, the law places limitations on the right to marry, in order to ensure the protection of public order. Pursuant to article 16, paragraph 2, of Act IV of 1952, marriage shall not be contracted in case of blood relationship or during the validity of a previous marriage.

(17) With regard to national security, the provisions of Act I of 1976 on National Defence are applicable, permitting limitations on the rights of the individual in the interest of the community and of national security.

(18) Concerning restrictions (connected with the protection of the environment) on the exercise of human rights and freedoms, mention may also be made of the following:

(*a*) Decision No. V.20.190/1975/2 of the Supreme Court concerning legality in civil law cases qualified the discharge of pollutants by industrial and other establishments as being contrary to the law and obliged the enterprise responsible to pay compensation for the damage caused.

(*b*) Acts gravely endangering public health are liable to be punished with imprisonment in addition to the obligation to pay compensation—in cases of greater gravity, fines for damage caused to the human environment.

(19) The Hungarian People's Republic has ratified the International Covenants on Human Rights.

IRAQ

[*24 December 1975*]

(1) Article 36 of the Provisional Constitution of Iraq limits the freedom of the individual so that it does not run counter to the objectives of the people. It therefore prohibits any activity that is inconsistent with the objectives of the people, as defined in the Constitution, and any act or conduct aimed at fragmenting the national unity of the popular masses, provoking racial, sectarian or regional prejudices in their ranks or undermining their advancement and progressive achievements.

(2) It should be mentioned that the Iraqi Provisional Constitution regards property as a social function to be exercised within the limits of the objectives of the community and the programmes of the country (art. 16, para. (*a*)). Private property and individual economic freedom are guaranteed within the framework of the law, subject to the condition that they are not exploited in a manner contrary or harmful to general economic planning (art. 16, para. (*b*)). Private property shall not be expropriated except in the public interest and against fair compensation in accordance with norms specified by law (art. 16, para. (*c*)). The maximum extent of property in land is determined by the law, any additional property in land being regarded as the property of the people (art. 16, para. (*d*)).

(3) The freedoms of individuals are limited in the sense that they must not harm the public interest or other individuals in society.

(4) The Provisional Constitution of Iraq guarantees the fundamental rights of the individual and prohibits any encroachment on these rights, while providing for duties which bind the individual to society.

(5) The most obvious of these rights is the right to equality, provided for in article 29, which states that all citizens are equal before the law, without distinction such as race, ethnic or social origin, language or religion (art. 29, para. (*a*)), and that equality of opportunity is guaranteed to all citizens within the limits determined by the law (art. 29, para. (*b*)).

(6) With respect to protection of individuals against oppression, the Provisional Constitution provides, under article 20, paragraph (*a*), that the individual is innocent until proved guilty by a legal

decision. Paragraph (*b*) of the same article recognizes the sanctity of the individual's right of defence at all stages of investigation and trial in conformity with the law. Paragraph (*c*) stipulates that the trial shall be held in public unless the court decides to hold closed sittings.

(7) The Provisional Constitution guarantees a number of rights of the individual (art. 21, para. (*a*)). It also affirms that the dignity of the human person is guaranteed and prohibits the application of any form of physical or psychological torture (art. 22, para. (*a*)).

(8) The Provisional Constitution further states that no person shall be arrested, detained, imprisoned or searched, except in accordance with the provisions of the law (art. 22, para. (*b*)). It also provides for the inviolability of dwellings and prohibits their entry or search, except in accordance with provisions specified by law (para. (*c*)).

(9) Article 23, which relates particularly to the protection of human rights, includes among these the right to freedom of movement; thus, no citizen may be forbidden to leave the country or to return to it, and no restrictions may be imposed on his movement or residence in the country, except in cases defined by law.

(10) Freedom of religious beliefs and worship is guaranteed, provided that this freedom is not inconsistent with the provisions of the Constitution and the law and that it is not incompatible with public morality and order (art. 25).

(11) The Provisional Constitution further guarantees freedom of opinion, publication, assembly, demonstration and the formation of political parties, trade unions and societies, subject to the provisions of the Constitution and the law.

(12) The Penal Code of Iraq, No. 111 of 1969, punishes crimes against the public interest, such as crimes that prejudice the State's external security (arts. 159–189), crimes affecting internal security (arts. 190–222) and crimes against public authority, including crimes against order-enforcement bodies (arts. 223–228) and attacks against public servants and others assigned to the public service (arts. 229–232).

(13) The Penal Code further punishes crimes against the national economy and financial credibility of the State, including crimes involving the abuse of public duties, such as bribery and embezzlement, and abuse of rights or functions (arts. 307–341).

(14) The Penal Code punishes crimes resulting in public danger, such as incendiary acts and the throwing of explosives (arts. 342–348), causing inundations or harming public utilities (arts. 349–353) and attacks against telecommunications (arts. 361–363). It also provides for the punishment of other crimes, such as obstructing work (arts. 364–367), crimes which jeopardize public health (arts. 368–369), social crimes, crimes which jeopardize family life and crimes against public morality (arts. 370–404).

(15) All the above-mentioned provisions restrict individuals in the exercise of their freedoms so that they do not harm the community. For their part, judges conform, in their judgements, to provisions relating to the rights and duties of the individual and act in the light of social realities.

(16) On 8 Feburary 1969 the Republic of Iraq signed the International Convention on the Elimination of All Forms of Racial Discrimination and ratified it by Law No. 35 of 1969. It has also ratified, by Law No. 193 of 1970, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

(17) In accordance with article 29 of the Universal Declaration of Human Rights, everyone has duties to the community and, in the exercise of his rights and freedoms, everyone is subject to such limitations as are determined by law for the purpose of securing recognition of and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(18) The above-mentioned concepts are embodied in the text of the Provisional Constitution, particularly in article 36 thereof, which prohibits any activity that runs counter to the objectives of the people as defined in the Constitution. Some of these concepts and principles are also embodied in the Iraqi Penal Code, which subjects individuals to restrictions determined by the law in order to protect and respect the rights and freedoms of others and to meet the just requirements of society. In other words, the rights and freedoms of the individual end where the rights and freedoms of others begin.

ISRAEL

[*5 November 1975*]

(1) According to the Court Law, 1957 (sect. 7), the Supreme Court sitting as a High Court of Justice has power to review administrative action in matters in which it deems it necessary to grant relief in the interest of justice.

(2) Individuals who feel themselves aggrieved in the exercise of their rights, freedoms and liberties can lodge a petition with the High Court. Many such cases are reported.

(3) In the absence of a written constitution or a fundamental law on human rights, the courts in Israel have developed, from the very beginning of the existence of the State, a theory of the limitations which can or cannot be imposed on the exercise of human rights.

(4) The following case would appear to sum up most points of the theory. The Minister of Defence requested the Minister of Education to refrain from employing as a teacher a man who advocated the use of arms even against the Israeli authorities in cases where he deemed it appropriate. The court said:

> " . . . had we refused this petition we would have been instrumental in reducing the principle of the rule of law in this country to a mere platitude. The fundamental meaning of this principle is that limitations—the imposition of which on the individual's liberty cannot be avoided to protect the liberties of others or the interests of society—may be imposed by law, i.e., by the opinion of society as reflected in the laws enacted by its representative legislature, and not by the executive authority whose duty is merely to enforce the imposition of these limitations according to such laws. The rule embodied in the principle says that the liberties of the individual cannot be limited or denied by an official or minister just because he thinks—perhaps justly—that such a course is for the benefit of the State. It is his duty to convince the legislature that such limitations are necessary, and only after having obtained its consent may he proceed to put the limitations into effect."[59]

(5) The major element of the theory relating to limitations on human rights is the principle of the rule of law even when a state of emergency exists. This principle applies not only to the executing authorities but also to the judiciary itself. In *Shalit* v. *Minister of Interior* (1969), 23 P.D. (II) 477, 600, the Supreme Court observed:

> "The principle of the rule of law means that a judge ought to refrain as much as possible from giving preference to his private views as to the requirements of justice in a particular case, lest he give rise to the suspicion that instead of interpreting the law he has adjudicated arbitrarily."

(6) A further aspect is the principle of legality, which may be formulated as follows: everyone is presumptively free and no restrictions on this liberty will be imposed except under law. This principle is contained in section 1 of the Draft Basic Law: Human Rights. In this regard, judicial review goes further than mere formal application on the principle of legality. Where an accused had been detained for eight months on a serious charge, his trial having been postponed immediately after the charge was made and bail having been refused by the lower court for fear of interference by the accused with witnesses, the Court rules that such a course "even if not contrary to the letter of the law, certainly negates the spirit of the law". The accused was ordered to be released on bail unless trial was proceeded with at once.[60]

(7) The principle of "permissibility", i.e. that everyone has the right and the faculty to do everything not expressly forbidden or limited by law, prevails. In a case involving freedom of employment, the Court said:

> "It is a basic principle that everyone has an inherent, natural right to pursue the calling or profession of his choice, unless such calling or profession is forbidden by law. Wherever the law imposes limitations or conditions precedent on the exercise of certain professions, no one can pursue them unless he has first complied with such conditions precedent . . . The right is not written in the Statute Book but arises from the natural right of every person to look for sources of income and to find an occupation from which to derive his livelihood."[61]

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[59] *Sheib* v. *Minister of Defence* (1951), *Selected Judgements of the Supreme Court of Israel.*

[60] *Amiel* v. *State of Israel* (1970), 24 P.D.

[61] *Bejerano* v. *Minister of Police* (1949), 80 P.D.

(8) Another point relating to the theory and practice of limitations on the exercise of human rights, is that limitations on the individual's rights are justified when intended to protect the liberties of others. The law and practice relating to defamation of privacy illustrate this point. On a petition against the refusal of the Censorship Board to allow the performance of a play, *Friends speak about Jesus*, the Court stated:

"The duty of mutual tolerance between individuals of different beliefs is so important that even the basic principle of freedom of expression ought to recede."[62] The petition was rejected, since the play might have offended the sensitivities of the Christian population.

(9) The interest of society which can give grounds for restrictions on the individual's liberties are essentially based on considerations of security, public order or public morals.

(10) In a case on pornography, the High Court said that in interpreting the penal section involved, it had to "demarcate the line between the permitted and the forbidden in each case in accordance with the advanced notions of our time, bearing in mind that every limitation of the right of expression is tainted with censorship, and in borderline cases the tendency will be to permit rather than to bar".[63]

(11) In another case, involving public security and individual welfare, the Court, by refusing to interfere, implicitly recognized the obligation imposed by subordinate legislation to wear a protective helmet when driving a motorcycle. The petitioner claimed that he had the right to be unhampered if he wished to endanger himself. The Court recognized, however, that it is difficult to demarcate the line at which interference by legislation ought to stop.[64]

(12) The principle of equality and non-discrimination is of course an important feature of the theory of limitations on the exercise of individual rights and freedoms. In Bergmann (1969), 23 P.D. (I) 693, where a constitutional issue was involved, the Court, which as a rule "accepts as authoritative any document which is in truth the authentic expression of the sovereign will", declared invalid a statute which provided for the financing of political parties in their electoral campaigns on the basis of their respective strengths in the outgoing Knesset. There was no provision for the new party lists. In an earlier Basic Law the Knesset had provided that the elections should, among other things, be "general" and "equal", any amendment of that provision requiring an absolute majority of the Knesset members. The Court said:

> "We have reached the conclusion that the absolute denial of the allocation of moneys to new lists of candidates seriously offends against the principle of equality laid down in section 4 of Basic Law: the Knesset. Under the Knesset Elections Law, every 750 voters may put up a list of candidates. A way is thus open to new parties in Parliament. This is one of the obvious characteristics of our democratic system in particular."

Although formally based on improper parliamentary procedure—the absolute majority not being obtained—this case in fact censured the legislator for the limitations on or the denial of the principle of equality in parliamentary elections. It may be added that the Knesset quickly re-enacted the law, this time granting an allowance of funds for new lists.

(13) It emerges from the foregoing that such notions and terms as "respect for the rights and freedoms of others", "in a democratic society", "morality", "public order" and so on avoid effective definition and are completly open to varying interpretations. Indeed, it would for obvious reasons be unduly constrictive, if not positively prejudicial, were the attempt made to give them precise statutory definitions. These terms express imponderable concepts, the real content of which can only be ascertained on pragmatic lines and in the light of the ever-varying circumstances and conditions of modern life. That they are not employed detrimentally and oppressively depends ultimately on the extent to which a sense of fairness and justice pervades the conscience of society and holds sway over the exercise of the affairs of government.

JAPAN

[*17 February 1976*]

(1) The following comments relate, in particular, to administrative remedies against limitations on the exercise of human rights and freedoms.

(2) In Japan, there are administrative remedies, in addition to judicial remedies, which are made available by the Civil Liberties Bureau of the Ministry of Justice and its local organs, and also by the Civil Liberties Commissioners, who are civilian workers appointed by the Minister of Justice.

(3) These organs have no power of compulsion, nor do the Commissioners. Hence, the action they may take in specific cases involving encroachments on human rights is to persuade the party encroaching on the rights of others to discontinue such encroachment spontaneously and respect the rights of others. In this way they take practical remedial measures in favour of the victim.

MAURITIUS

[*20 February 1976*]

(1) The Constitution sets out human rights and freedoms, together with limitations thereon, and provides, in section 3, that:

> ". . . the provisions of this chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in the provisions, being limitations designed to ensure that the enjoyment of said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

(2) The fundamental rights and freedoms listed in sections 3 to 16 and in section 18 of the Constitution also carry limitations which are usually couched in terms like "in the interest of defence, public safety, public order, public morality, public health", or "of securing compliance with any international obligation of the Government".

(3) The Public Order Act (67/70), especially in sections 3 to 10, 21 to 23, 25 to 27, 30, 42 and 43, also includes references to limitations of human rights.

(4) Section 17 of the Constitution expressly gives jurisdiction to the Supreme Court on questions relating to human rights and freedoms. Any person who alleges that any of his rights or freedoms has been, is being, or is likely to be contravened in relation to him may apply for redress to the Supreme Court. In the case *Police* v. *Moorba* (MR 199) it was held that sections 9 (1) and (3) of the Public Order Act 1970 were not *ultra vires* section 13 of the Constitution, which deals with freedom of assembly and association. The Court also held, however, that a law giving the Commissioner of Police an unfettered right to restrict freedom of assembly would be unconstitutional. In *Virasawmy* v. *Commissioner of Police*, 1972 (MR 255), it was held that solitary confinement and the physical and mental discomfort caused by such confinement did not constitute torture or inhuman treatment within the meaning of section 7(1) of the Constitution.

(5) In *Director of Public Prosecutions* v. *Mason*, 1972 (MR 204), the question arose whether section 283 of the Penal Code creating the offence of sedition was not inconsistent with section 12 of the Constitution, in view of the judgement of the Supreme Court in *Rex* v. *Millien*, 1949 (MR 35), in which the court had held that under the law of Mauritius it was not a necessary ingredient of the offence of sedition that the publication should be calculated to incite people to commit violence. It was held that if the Court were to give to section 283 of the Penal Code the meaning given to it by the judges who decided the Millien case, it must come to the conclusion that the section was beyond the permissible limits of restrictions which the legislature was empowered to impose under section 12 of the Constitution.

(6) In *Duval* v. *Commissioner of Police*, 1974 (SCR 17793), the plaintiff applied for redress under section 17 of the Constitution, alleging that the provisions of sections 12, 13 and 16 of the Constitution had been and were likely to be contravened in relation to him by the defendent. He sought from the Court a declaration that the defendant was wrong to have interfered with his constitutional rights, and an order restraining him from interfering with those rights in future. It was held that freedom of expression is subject to certain restrictions which may be imposed in the interests of public safety or public order, provided that those restrictions are reasonly justifiable in a democratic society. By imposing a pre-censorship upon the plaintiff's paper, the defendant had restricted his freedom of expression. It was held, however, that regulation 2 (1) of the

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[62] *Kenan* v. *Films and Theatre Censorship Board* (1971), 26 P.D. (II) 811.

[63] *Omer* v. *State of Israel* (1970), 24 P.D. (I) 408.

[64] *Eli* v. *Minister of Transport* (1972), 26 P.D. (I) 105.

Emergency Powers (Control of the Press) Regulations, 1971, was made in the interests of public safety or public order and was reasonably justifiable in a democratic society and therefore valid. It was held, further, that regulation 2 (1) quoted above does not give an unfettered discretion to the Commissioner of Police; it merely empowers him, during a period of public emergency, to take action which will have the effect of restricting a fundamental freedom of an individual, provided that he is satisfied that that freedom, if not restricted, would be prejudical to public safety or public order. The reasonableness of his decision can further be questioned in Court. It was held, on the facts, that the plaintiff had failed to prove that the defendant had contravened section 16 of the Constitution (Protection against discrimination).

(7) It was held, in approving the decision in *Melin* v. *The Queen*, 1973 (SCR 2096), that regulation 4 of the Emergency Powers (Control of Gatherings) Regulations, 1971, which deals with all gatherings generally, "is a restriction on the right of assembly imposed in the interests of public order". It was held also that regulation 3(*a*), which deals exclusively with public gatherings, does not give the Commissioner of Police an unfettered discretion to control the right of assembly.

MOROCCO

[*12 July 1976*]

(1) To some extent, the limitations set out in paragraph 2 of article 29 of the Universal Declaration of Human Rights reflect the duties referred to in paragraph 1. Thus, the duties of citizens correspond to the limitations imposed on their rights and freedoms when these limitations are justified by "recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". For example, the duty to respect the reputation of others is parallel to one of the limitations imposed on freedom of expression. Be that as it may, the derogations from fundamental rights and freedoms laid down in Moroccan legislation and justified by the above reasons are as follows.

(2) The right to life, liberty and security of person (Universal Declaration, art. 3) can be legally impaired only by the judicial imposition of the penalties laid down in the Penal Code (capital punishment, deprivation of liberty) and by the imposition of preventive custody. In this connection, it should be borne in mind:

(*a*) That the death penalty applies only to exceptionally serious crimes (Penal Code, arts. 155, 163, 165, 167, 181, 182, 185, 190, 201, 202, 203, 204, 369, 393, 396, 398, 399, 410, 411(5), 412, 439, 463, 474, 580, 584 and 591); that once it has become irrevocable, the death sentence cannot be carried out unless an appeal for mercy has been examined and rejected in each case (article 849 of the Code of Criminal Procedure and the Law of 6 February 1958 on pardons and remissions); that the death sentence cannot be carried out on a pregnant woman (Penal Code, art. 21);

(*b*) That all penalties involving loss of liberty can be the subject of an appeal for mercy and of total or partial remission;

(*c*) That preventive custody is an exceptional measure reserved for the most serious offences punishable by imprisonment and that the procedure for its application are strictly regulated by the Code of Criminal Procedure.

(*c*) That preventive custody is an exceptional measure reserved for the most serious offences punishable by imprisonment and that the procedures for its application are strictly regulated by the Code of Criminal Procedure.

(3) With regard to the prohibition of slavery (Universal Declaration, art. 4), Morocco has acceded to the Geneva Convention of 25 September 1925, the Protocol of 7 December 1953 and the Supplementary Convention of 7 September 1956, and no derogation from this prohibition is tolerated in its territory.

(4) As to the prohibition of torture and cruel, inhuman or degrading treatment or punishment (Universal Declaration, art. 5), not only is no temporary or permanent derogation from this prohibition permitted, but any such abuse of the person is punishable under articles 231 and 400 ff. of the Penal Code in accordance with its gravity, irrespective of whether it has been committed by a magistrate or public official or by a private individual.

(5) With regard to the right to an effective remedy by the national tribunals for acts violating fundamental rights (Universal Declaration, art. 8), any injury whatsoever, and *a fortiori* any injury resulting from the violation of one of the rights proclaimed in the Universal Declaration and subsequent instruments, whoever the perpetrator or the victim, entails the absolute right of access to the competent tribunals in order to obtain a remedy. Compensation for damage may be obtained, with legal assistance if necessary, in several ways, either through the application of articles 79 ff. of the Law of 12 August 1913 promulgating the Code of Obligations and Contracts, or directly in the criminal courts under articles 7 to 14 of the Code of Criminal Procedure.

(6) Concerning the prohibition of arbitrary arrest, detention or exile (Universal Declaration, art. 9), article 10 of the Constitution provides that "no one shall be arrested, detained or punished except as provided by law and in accordance with the prescribed procedures". Restrictions on individual freedom have been reduced to a strict minimum by the Code of Criminal Procedure. Thus, the periods for which an individual may be detained in custody are clearly laid down in articles 68 and 82 of this Code and, in all cases, are controlled by the Parquet (Public Procescutor's Department). Moreover, article 152 of the same Code provides that detention is an exceptional measure, permitted only for the most dangerous offences under the authority of the correctional division of the Court of Appeal, with which, at any stage of the examination, an appeal against a decision to refuse a conditional release may be lodged. Finally, with regard to the prohibition of arbitrary exile, it should be noted that the Moroccan Penal Code does not provide for banisment.

(7) With regard to the right of everyone, in full equality, to a fair and public hearing by an impartial tribunal of any criminal charge against him (Universal Declaration, art. 10), in penal as in administrative and civil matters, the impartiality of the courts is ensured by articles 76 and 79 of the Constitution, which establish, respectively, the independence of the judiciary from the executive and the irremovability of judges. In view of the guarantees and judicial procedures set out in the Code of Criminal Procedure, the right to be judged fairly in penal matters is subject to no discrimination and no limitation.

(8) With reference to the presumption of innocence and the protection of the rights of the defence (Universal Declaration, art. 11, para. 1), although the presumption of innocence is not explicitly laid down in the Code of Criminal Procedure, the Code is obviously based on this presumption, which applies to everyone, irrespective of the previous history of the accused person or prisoner. There is no exception to this rule. It is for the prosecution to prove that the offence has been committed, not for the alleged perpetrator to prove his innocence. In all cases, the judge must make his decision on the basis of his reasonable certainty of the truth (Code of Criminal Procedure, art. 288). The Code contains a number of precautions to safeguard the rights of the defence for all persons brought before criminal courts. Defendants may organize their defence as they wish, without any restraint. The measures laid down in the Code include the assistance of a defence counsel and that of an interpreter when the accused person or prisoner does not speak the language used during the investigation and the hearing, or if he is deaf or dumb (Code of Criminal Procedure, arts. 112, 113, 127, 134, 310, 311 and 313). Everyone has the right to choose counsel for his defence. On request, the defence counsel may be appointed by the court, without charge. The presence of a defence counsel is mandatory in criminal cases and also for minors below 16 years of age, for invalids, and for persons liable to life sentences. Generally speaking, every effort has been made in the Moroccan legislation to provide reliable guarantees of the right to be judged fairly, legally and on a basis of equality.

(9) On the question of the non-retroactivity of penal law and the imposition of the lightest penalty (Universal Declaration, art. 11, para. 2), article 4 of the Constitution provides that "the law has no retroactive effect", and article 4 of the Penal Code states that "no one can be sentenced for an act which did not constitute an offence under the law in force at the time when it was committed". Moreover, article 6 of the Code provides that "where several laws were in force between the time when the offence was committed and the final verdict, the law providing for the lightest penalty shall be applicable". Like the other provisions referred to, this text, which goes further than the rule laid down in the Declaration, allows of no exceptions.

(10) Concerning the prohibition of arbitrary interference with privacy, family, home or correspondence and of attacks upon honour and reputation (Universal Declaration, art. 12), under article 10, paragraph 2, of the Constitution "the home is inviolable; searches may be made only under the conditions and according to the procedures provided for by law". The only permissible derogations

from the right of inviolability of the home are for reasons of public order. Searches, which are solely for the purpose of obtaining evidence of a criminal offence, are carefully regulated by the Code of Criminal Procedure with regard to legal hours and the formalities to be observed (Code of Criminal Procedure, arts. 64 ff. and 103). Moreover, except in the case of serious crimes or of *flagrante delicto*, searches may be carried out or authorized only by the examining judge. Article 230 of the Penal Code prohibits the entry of a judge or public official into the home of an individual against his will and except as provided by law. Everyone is bound to respect the correspondence of others and violation of the secrecy of correspondence constitutes an offence. Penalties for attacks upon honour and reputation constitute a limitation on the freedom of opinion and expression embodied in article 19 of the Universal Declaration and article 9 of the Constitution. The last-named article provides that limitations on the exercise of those freedoms cannot be imposed except by law. In this connection, the Law of 3 Joumada I 1378 (15 November 1958), promulgating the Moroccan Press Code, imposes upon the freedom of the press, which it establishes as a principle, certain limitations intended, in particular, to reconcile freedom of expression with safeguards for individuals. The exercise of freedom of expression is indeed open to abuse, and it is not paradoxical to say that a freedom really exists only in so far as it harms no one. Thus, the text condemns calumny, defamation and abuse, as well as insults to the authorities representing the State or a foreign Government.

(11) Article 9 of the Constitution establishes the right to freedom of movement and residence and the right to leave any country including one's own (Universal Declaration, art 13), the sole limitations being that aliens must enter the territory in accordance with the regulations and that they must have the documents provided for in the rules governing their stay. In addition, the right to leave the country is limited only temporarily under article 158 of the Code of Criminal Procedure, which provides for prescribed residence and provisional confiscation of passport in the case of an alien who has committed an offence and has been granted provisional release.

(12) In connection with the right of asylum (Universal Declaration, art. 14), Morocco, by the Law of 8 August 1955, acceded to the Convention relating to the Status of Refugees of 28 July 1951. Under the Decree of 29 August 1957, enacted to give effect to the Convention, the only requirement is that refugee status should be established by an office for refugees and stateless persons set up for the purpose in accordance with the procedures established by the Decree, including, in particular, a procedure for appeal against adverse decisions taken by that office.

(13) As for the right to a nationality (Universal Declaration, art. 15), the right to acquire Moroccan nationality is provided for in the Law of 6 September 1958, promulgating the Moroccan Nationality Code. The only conditions laid down in this text relate to residence, age, health, good behaviour, knowledge of Arabic and adequate resources.

(14) With respect to the right to own property (Universal Declaration, art. 17), attacks against private property are punishable under the Penal Code. Moreover, although the community is entitled to carry out expropriations in the public interest, it can do so only as provided by law and in accordance with its procedures (Constitution, art. 15). In this connection, the Law of 5 April 1951 on expropriations for reasons of public interest imposes three conditions: (*a*) the public interest must be demonstrated; (*b*) expropriation may be authorized only by a court and in accordance with a specific procedure; (*c*) there must be fair and prior compensation.

(15) With regard to the right to freedom of thought, conscience and religion (Universal Declaration, art. 18), there can be no derogation from freedom of thought or conscience. As to freedom of religion, everyone has a duty to respect the religion of others; any failure to do so is punishable under penal law. The liberalism of Islam is tempered only by the prohibition of engaging in proselytism among Moslems.

(16) The right to freedom of assembly and association (Universal Declaration, art. 20), which is embodied in article 9 of the Constitution, had already been recognized by the Law of 15 November 1958 on public assembly and by the Law of the same date on the right of association. The only limitations on these freedoms have been imposed for reasons of public order.

(17) It will be seen that, under the Moroccan Constitution, restrictions and limitations on the fundamental rights it proclaims may be imposed only by law.

(18) The Constitution contains no general provision that the national law shall not be such as to impair, nor shall it be so applied as to impair, the guarantees for the protection of human rights and freedoms provided for in the national Constitution and relevant international instruments. Nor does it require that limitations on certain rights determined by law are permissible only within the framework of a "democratic society".

(19) With regard to the first consideration, in view of its general context, there was no need for express inclusion in the Constitution of any such provision. Indeed, it goes without saying that the national legislation and the instruments adopted to apply it may refer, with regard to limitations and restrictions on the scope of human rights, only to "the purpose of securing . . . respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare", in accordance with article 29, paragraph 2, of the Universal Declaration.

(20) With regard to the second consideration, there was no need to require in the Constitution that limitations on human rights should be permissible only within a democratic society, since under article 1 "Morocco is a constitutional, democratic and social monarchy".

(21) With regard to the scope of the right and power of the legislature to establish limitations on human rights and freedoms, although article 4 of the Constitution proclaims that the law is the supreme expression of the will of the nation and that everyone must obey the law, it would be unthinkable for laws to go beyond the limits laid down in article 29, paragraph 2, of the Universal Declaration.

(22) In connection with the same question as applied to the executive and administrative authorities, it should be noted that any private person or legal person under public law may apply to the administrative division of the Supreme Court for the annulment of any decisions of an administrative authority which are vitiated by action *ultra vires* (Code of Civil Procedure, art. 353 ff.).

(23) As to the meaning of terms, the term "respect for the rights and freedoms of others" used in article 29, paragraph 2, of the Universal Declaration seems to be self-explanatory, since the rights and freedoms in question are those recognized in the Declaration.

(24) The term "morality" or "morals" should be defined as the relationship between human acts and the principles by which they are governed.

(25) Generally speaking, "public order" should be interpreted as the sum of the rules which ensure the security of a society. It is, however, difficult to define the scope of this term, since the concept is open to several interpretations and moreover varies in time and space. Many writers have been unsuccessful in their attempt to define the concept, because of the many forms it can assume. A breach of public order can be purely material, as in the case of any violent demonstration liable to disturb the peace. It can also, even if there is no violence, offend against religious convictions, the foundations of society or moral principles. The concept varies in time, since public order is not immutable in any given society. The development of customs and social, political and moral standards can sometimes lead to startling changes in the accepted view of public order. Thus, a society which once prohibited affiliation proceedings ended by permitting them, and another which opposed divorce on the basis of the dogma of the indissolubility of marriage was finally obliged to accept it. As far as rules of decency are concerned, publications which would have been regarded as immoral, and hence a threat to public order, a century ago now seem to be so anodyne that no one would dream of being offended by them. The concept also varies in space, from one country to another. Freedom of religion is recognized in some countries and disapproved of in others. In some countries marriage and divorce are subject to religious regulations, and in others to exclusively secular rules. These differences give rise to complex problems at the international level, since a country whose institutions are strictly secular will be unwilling to recognize in its territory the application of denominational laws, or the execution of decisions handed down in accordance with these laws, which run counter to its national ideas. Conversely, a State in which religious regulations have the force of law will find it difficult to recognize decisions handed down in secular form. To sum up, since it is difficult to find a satisfactory and exhaustive definition of public order, it seems that the term might be defined as the whole set of fundamental principles on which the supreme interests of a given society are founded, which can be neither evaded or modified, but violation of which may imply only partial illegality of a legal act or foreign law the application of which is requested in the national territory.

(26) The term "public safety" would seem to relate to provisions intended to ensure, within the country, the public peace, social harmony and respect for the decisions of the public authorities.

(27) Conversely, the term "national security" would seem to relate to measures enacted with a view to safeguarding territorial integrity and national independence against any external threat.

(28) With regard to the provisions of article 30 of the Universal Declaration in relation to those of article 29, the two texts may be regarded as complementary, since article 30 provides as a requirement that no legal or private person can in any case, by extension, invoke any of the provisions of the Declaration so as to prejudice in any manner whatsoever the rights and freedoms proclaimed in the Declaration.

(29) Lastly, since the exercise of human rights is guaranteed by the Constitution and by the legislation enacted for its application, this exercise is ensured without any limitations other than those generally permitted, and accordingly the Moroccan courts have never had occasion to take action to curb any acts prejudicial to these rights.

(30) To sum up, it will be seen from the foregoing that the constitutional, legislative and regulatory provisions of Moroccan law have been drawn up so as to reconcile the full exercise of the human rights and fundamental freedoms embodied in the Universal Declaration of Human Rights and the International Covenants on Human Rights with the requirements of national security, public safety, the protection of health and morality, the safeguarding of the rights and freedoms of others, and also the economic well-being of the country. These provisions thus combine all the factors for the establishment of a society "with a human face", in which the spiritual heritage of the national past can be harmoniously integrated with the dynamism required for the modern development of the country's full potential, and in which an equitable balance can therefore always be maintained between the individual's rights and the community and his duties to the community.

PAKISTAN

[14 May 1976]

(1) The Constitution of Pakistan recognizes, that citizens have a duty towards the State and other members of the community. It therefore imposes a duty upon them to exercise their constitutional rights in such a manner as not to destroy the rights of others; consequently, limitations have been imposed on them.

(2) Part I, chapter 1, of the Constitution contains a clear statement with respect to those rights of the individual, whether regarded as an individual or as a member of a wider group such as a community or religious denomination, which are regarded as fundamental and necessary. The rights are fundamental, not because they have been recognized in the Constitution as such, but because they belong to that category of human rights which are essential to the existence of human beings and which cannot be disregarded by any authority in a civilized State. Their incorporation in the Constitution imposes a check on the legislative and executive authorities. They cannot be altered by a simple majority in the legislature; they can only be altered by means of a constitutional amendment, as provided for in article 239 of the Constitution.

(3) However, these rights are not absolute and unalterable. They are subject to some limitations and control. Absolute and unrestricted individual rights do not exist in any modern State and there is no such thing as absolute and uncontrolled liberty. The collective interests of society, the peace and security of the State and the maintenance of public order are of vital importance in any organized society. Fundamental rights have no real meaning if the State itself is in danger, for if the State is in danger, the liberties of its subjects are also in danger. It is for these reasons that, as expressed in a judgement pronounced by a High Court in Pakistan, an equilibrium has to be maintained between, first, the individual liberties and positive rights of citizens, which are declared by the Constitution to be fundamental, and, secondly, the need to impose social control and reasonable limitations on the enjoyment of these rights in the interest of the collective good of society.

(4) Different societies have different interests, and each society is founded on some basic and fundamental principles which it follows and in accordance with which it wishes to regulate its affairs. Pakistan has a society which is based on Islamic principles of social justice. According to Islamic philosophy, certain restrictions have to be imposed, in the interest of the nation, on the enjoyment of fundamental rights. These restrictions, which are mostly of a general nature, are found to be necessary, with slight modifications and adjustments, in every established society, and most of them have been recognized by the United Nations in various instruments. Limitations on the enjoyment of human rights may be imposed for the reasons given below:

(*a*) Freedom of movement can be restricted in the public interest (Constitution, art. 15);

(*b*) Freedom of assembly can be restricted in the interest of public order (Constitution, art. 16);

(*c*) Freedom of association can be regulated in the interest of morality and public order and of the sovereignty and integrity of Pakistan (Constitution, art. 17);

(*d*) Freedom to conduct any lawful trade or business or to engage in any lawful profession is guaranteed by article 18 of the Constitution, but nothing in that article may prevent:

(i) The regulation of any trade or profession by a licensing system;

(ii) The regulation of trade, commerce or industry in the interest of free competition;

(iii) The carrying on, by the Federal Government or a provincial government, or by a corporation controlled by such government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons;

(*e*) Freedom of speech can be restricted in the interest of the glory of Islam or the integrity, security or defence of Pakistan, friendly relations with foreign States, public order, decency and morality, or in relation to contempts of court (Constitution, art. 19);

(*f*) Freedom to profess religion and to manage religious institutions is subject to law, public order and morality (Constitution, art. 20);

(*g*) Every citizen has the right to acquire, hold and dispose of property, subject to reasonable restriction imposed by the law in the public interest (Constitution, art. 23). However, according to article 24 of the Constitution, no person shall be deprived of his property except in accordance with law and only for a public purpose and after payment of compensation. In certain circumstances, the State is authorized to acquire property compulsorily so as to prevent danger to life, property or public health, or to take over property acquired by unlawful and unfair means.

(5) The rights established by the following constitutional provisions are not subject to limitation: article 9, which provides for security of person; article 11, which prohibits slavery and forced labour; article 12, which prohibits retrospective punishment; article 13, which guarantees protection against double punishment and self-incrimination; article 14, which prohibits the use of torture for the purpose of obtaining evidence; article 21, which establishes that no person shall be required to pay any special tax the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own; and article 22, according to which no person attending any educational institution is required to receive religious instruction, or take part in any religious ceremony, or attend religious worship, if such instruction, ceremony or worship relates to a religion other than his own.

(6) However, if the President is satisfied that the security of Pakistan is threatened by war, external aggression or serious internal disturbance he may, under article 232 of the Constitution, issue a Proclamation of Emergency. Under article 253 of the Constitution, nothing contained in articles 15, 16, 17, 18, 19 and 24 shall, while a Proclamation of Emergency is in force, restrict the power of the State to make any law or take any executive action which it would, but for the provisions of those articles, be competent to make or to take. While a Proclamation of Emergency is in force, the President may, by order, declare that the right to apply to any court for enforcement of such constitutional rights as may be specified in the order shall remain suspended for the period during which the Proclamation is in force.

(7) From the above, it is clear that only the rights mentioned in paragraph (4) above may be suspended. The rights mentioned in paragraph (5) above cannot be suspended by the President even during an emergency; they can be temporarily suspended or permanently removed only by means of an amendment to the Constitution.

(8) Under article 8 of the Constitution, no law can be passed which takes away or abridges the fundamental rights guaranteed by the Constitution. Any law made in contravention of that article shall, to the extent of the contravention, be void. However, the provisions of the article do not apply to any law relating to members of the armed forces or the police or such other forces as are charged with the maintenance of public order. Nor do they apply to the laws specified in the First Schedule as in force immediately before the entry into

force of the Constitution, and no such law can be declared void on the ground that it is inconsistent with, or repugnant to, any provision of part II, chapter 1, "Fundamental rights", of the Constitution.

(9) The legislative, administrative and executive authorities are required to act within the limits laid down in the Constitution. The courts have been given the power of judicial review. In one case, the Supreme Court of Pakistan observed that it is within the scope of the judicial review to examine the reasonableness of the law itself and the reasonableness of the mode of application of any restriction, whether such a mode be prescribed by statute or not. The citizen is entitled to approach the court for a declaration that his freedom has been unreasonably restrained. The courts cannot regard themselves as satisfied that a citizen's freedom has been subject to reasonable restriction unless it is proved to their satisfaction that the grounds for the restriction, as stated by the law, are reasonable in themselves and that the restrictions have been applied reasonably as required by the Constitution. Under article 199 of the Constitution, individuals can challenge the authorities on the ground that they have acted arbitrarily in a matter.

(10) The terms "respect for the rights and freedoms of others" and "in a democratic society" are not in common use, and have no particular meaning, in Pakistan. However, the Constitution is based on the principles of social justice enunciated by Islam. The basic principles of social justice by which the State is to be guided are established in the "Principles of policy" set out in part II, chapter 2, of the Constitution. The State must bear these principles in mind when making laws.

(11) According to the preamble of the Constitution, Pakistan is a democratic country. This means that the State is governed by the representatives of the people, who are elected to the legislative bodies, as determined by the Constitution, on the basis of direct adult suffrage. The majority party forms the Government; the minority party is allowed to play the role of an opposition party within the limits laid down by law.

(12) The terms "morality" or "morals" have not been defined. However, according to the principles of policy set out in the Constitution, the State is required, in respect of Mulsims, to endeavour to promote observance of Islamic moral standards. Islam is a complete code of life dealing with every sphere of human activity. The fact that the State religion is Islam does not mean that other religions have no place in society. They are respected and every citizen has the right, guaranteed by the Constitution, to profess and propagate his religion. The State is required to promote the standard of collective behaviour prescribed by Islam. For example, it is the duty of the State to try to eliminate prostitution, gambling and obscenity, which are prohibited according to Islamic principles.

(13) The words "public order" have been used in the Constitution but have no specific meaning. They have been used in their general meaning, not necessarily to denote the antithesis of disorder. According to the High Court of Lahore, a man may commit an act which may not cause disorder but which may adversely affect human safety. According to the same Court, the term covers the notions of protection of persons and property, the safety of human life, public peace and tranquillity.

(14) The term "general welfare" is not in use in any legal document. Any action which the State is required to take in the interest of the general public is covered by the terms "public purpose" or "public interest", which have been used in the Constitution and in laws. They are not capable of precise definition and have no rigid meaning, being interpreted in the light of the statute in which they occur and of the circumstances prevailing at a particular time. The concept varies with time and with the state of society and its needs. The "interest" must be that of the public rather than that of a particular individual or group of individuals. For reasons of "public purpose", the Constitution has imposed certain limitations on property rights (see article 24) and, as mentioned above, restrictions have been placed on certain fundamental rights in the "public interest". With the advance of civilization, the notion of the scope of the general interest of the community is rapidly changing, with the result that the old and narrower notion of the sanctity of the private interest of the individual is giving way to the broader notion of the general interest of the community. Thus, it is possible for the State to make laws which are necessary for conomic and social welfare and general development, and laws to ensure the protection of the human environment and public health.

(15) The term "public safety" has not been defined. It is, however, used in relation to matters which are necessary for the safety of the general public as opposed to that of private individuals.

(16) The term "national security" has not been defined but is used in connection with the security of the State as a whole. National security is menaced by any activity prejudicial to the existence of the State. According to article 232 of the Constitution, a grave emergency exists when the security of Pakistan, or any part thereof, is threatened by war, external aggression or very serious internal disturbance. Thus, war, rebellion and insurrection would threaten "national security"; riots and ordinary disturbances of the peace are covered by the term "public order".

SENEGAL

[30 April 1976]

(1) The Constitution of the Republic of Senegal of 8 March 1963 contains a title II on "Civil freedoms and freedoms of the human person", which confirms the devotion of the Senegalese people to fundamental rights, as defined in the Declaration of the Rights of Man and of the Citizen of 1789 and in the Universal Declaration of Human Rights of 10 December 1948.

(2) The right to life, the right not to be held in slavery or servitude, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to freedom of thought—these, among others, are rights from which no derogation is permitted.

(3) Article 6, third paragraph, of the Senegalese Constitution reads: "Everyone shall have the right to free development of his personality, provided that he does not violate the rights of others or act contrary to the rule of law. Everyone shall have the right to life and to physical integrity under the conditions defined by law."

(4) Article 8 reads: "Everyone shall have the right to express and disseminate his opinions freely in oral, written or pictorial form. . . ."

(5) Article 20 grants everyone the right to work and the right to aspire to employment. It guarantees the right to work, while recognizing the right to strike.

(6) The division of legislative powers between the National Assembly and the executive is laid down by the Constitution itself. The principle is that the National Assembly possesses the legislative power; it alone votes laws, which establish rules concerning: (*a*) civic rights and the fundamental guarantees accorded to citizens for the exercise of public freedoms; the servitudes imposed by national defence on the person and property of citizens; (*b*) the determination of crimes and offences and the penalties applicable to them; criminal procedure; (*c*) the fundamental guarantees accorded to civil and military officials of the State. The law also lays down the basic principles governing: (*a*) the system of land tenure and civil and commercial obligations; (*b*) labour law, trade-union law and social security. Lastly, programme laws determine the objectives of the State's economic and social activities. This delimitation of the sphere of the law requires that the National Assembly must act in conformity with the Constitution.

(7) In Senegalese law, the principle is that the public freedoms forming individual, political, social and economic rights come within the sphere of the law, hence of the legislature. The executive only takes regulatory measures, that is to say, measures necessary for implementation of the law. In exceptional circumstances, however—for example, when the institutions of the Republic, the independence of the nation, the integrity of the territory or the fulfilment of its international commitments are gravely and directly threatened, and the normal functioning of the public authorities is disrupted—the President of the Republic may, after informing the nation, take any measure, except revision of the Constitution, designed to restore the normal functioning of the public authorities and to safeguard the nation. These measures are accompanied by conditions designed to protect the rights and freedoms of citizens. Thus, article 47 of the Constitution provides that during the exercise of exceptional powers, the National Assembly shall meet automatically and legislative measures enforced by the President shall be submitted to it for ratification within 15 days of their promulgation. Such measures become null and void if the bill of ratification is not laid before the National Assembly within that time. The Assembly may amend the measures at the time the Act of Ratification is put to the vote.

(8) Senegal is a country governed by law, and the legal order is such that the Constitution takes precedence over all other rules. Laws, decrees and orders must therefore be in conformity with it. To ensure such conformity, it is necessary to verify the constitutionality

of laws. Such verification is exercised, not through exceptional procedures whereby a citizen having an interest could apply to the judge for non-application of the unconstitutional law, but through action open only to the President of the Republic, the Prime Minister and the President of the National Assembly, within the limits prescribed by the Constitution and the organic laws. In this connection, special attention is drawn to the following provisions of the Constitution:

"*Article 63*

"Within the time-limit fixed for promulgation, the President of the Republic may submit to the Supreme Court an appeal that the law be declared unconstitutional.

"*Article 64*

"The time-limit for promulgation shall be suspended until the conclusion of the second deliberation of the National Assembly or the decision of the Supreme Court declaring the law to be in conformity with the Constitution. . . .

"*Article 65*

"Matters which do not fall within the legislative sphere pursuant to this Constitution are of a regulatory nature.

"Legislative texts concerning these matters may be amended by decree if the Supreme Court, at the request of the President of the Republic, has declared them to be of a regulatory nature by virtue of the preceding paragraph.

". . .

"*Article 67*

"Laws characterized by the Constitution as organic laws shall be adopted and amended by an absolute majority of the members of the National Assembly.

"They may not be promulgated unless the Supreme Court, to which they must be referred by the President of the Republic, has declared them to be in conformity with the Constitution.

". . .

"*Article 78*

"If the Supreme Court has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve it may not be given until the Constitution has been amended.

". . .

"*Article 82*

"The Supreme Court shall rule on the constitutionality of laws and international agreements, and on conflicts of competence between the executive and the legislature. It shall decide whether the executive authorities have exceeded their powers."

(9) Attention is also drawn to the provisions of article 6 of the organic law on the Supreme Court, according to which the Supreme Court is obliged to express its opinion on government bills submitted to it by the President of the Republic—particularly, in accordance with article 46 of the Constitution, government bills submitted to referendum. When requested by the President of the Republic or by the Prime Minister, acting within his powers, the Supreme Court is also required to express its opinion in all cases in which legislative or regulatory provisions require that it should intervene. The Supreme Court may also be consulted, under the conditions described in the previous sentence, or any draft text or any administrative difficulties that may arise. When requested by the President of the National Assembly, the Supreme Court may give its opinion on a proposed law after it has been considered by the competent committee.

(10) When an individual has grounds for complaint regarding an administrative act, he may either apply to the superior officer of the person who committed the unlawful act, requesting him to reverse his subordinate's decision, or appeal against abuse of power by applying to the Supreme Court to annul the unlawful act.

(11) The following observations are offered concerning the meaning of the notions and terms "respect for the rights and freedoms of others", "in a democratic society", "morals", "public order", "general welfare", "public safety" and "national security".

(12) Rights and freedoms mean prerogatives to enjoy something granted to an individual by law. Respect for the rights and freedoms of others is expressed in the principle of the legality of material and juridical acts.

(13) For liberal democracies, a "democratic society" means a society which permits the existence of more than one ideology and party. Emphasis is placed on the vote, and elections with a view to gaining power are contested by the various political parties. For people's democracies, a society is called "democratic" when its means of production are socialized. Such a society, being homogeneous by force of circumstances, has only one ideology, represented by a single party. Since the elections are not contested, it is called "unanimous".

(14) "Morals" means the relationship between conduct and morality. When the relationship is satisfactory, sound moral principles are being observed.

(15) "Public order" means the nature of the legal rules which, for reasons of morality or essential security, are necessary in social relations.

(16) "General welfare" means the general interest.

(17) "Public safety" means the prevention, for all individuals, of any danger in any form.

(18) "National security" means peace and stability in the community.

(19) The following information is provided on constitutional, legislative and regulatory provisions referring to limitations on the exercise of rights and freedoms imposed for the protection of "the rights and freedoms of others", "morality" ("morals"), "general welfare" and "public safety".

(20) As has already been stated, title II, "Civil freedoms and freedoms of the human person", of the Constitution of the Republic of Senegal confirms the devotion of the Senegalese people to fundamental rights, as defined in the Declaration of the Rights of Man and of the Citizen of 1789 and in the Universal Declaration of Human Rights of 10 December 1948. The necessary and obvious consequence of this recognition of the fundamental rights of the individual is that he is required to discharge a number of duties to the community, which take the form of legal obligations to perform or to refrain from certain actions.

(21) As to "morality" ("morals"), Act No. 69–49 of 16 July 1969 provides that no establishment for the sale of drink may be opened without the prior authorization of the administrative authority. It also stipulates that anyone found obviously drunk on the public highway, or in a place open to the public, shall be taken to the nearest police station or *gendarmerie*, where he may be detained until he comes to his senses. A second conviction for public and manifest drunkenness may entail suspension of a person's driving licence if it is considered that he is a danger to himself and to others. Act No. 72–24 of 19 April 1972 provides for the punishment of offences relating to narcotics. The penalty for such offences is imprisonment for not less than one year or more than 10 years. Act No. 66–21, on action to combat venereal disease and prostitution, set up a health and social card-index system, the purpose of which is to detect prostitutes suffering from venereal disease but attempting to avoid treatment, to reconstitute medical record books lost by their owners, and to collect full and accurate information of statistical, epidemiological and sociological interest.

(22) Concerning the term "general welfare", when Senegal became independent the political leaders were very soon faced with the question which of the political organs should be made responsible for promoting economic and social development. In view of the importance of the matter and the fact that more means were available to the executive than to the legislature, the choice fell on the executive. This explains why, in matters of economic and social development, protection of the human environment and public health, the National Assembly merely establishes the basic principles, leaving the executive to issue detailed regulations.

(23) The comments concerning the term "public safety" are similar to those made above in relation to the term "morality".

(24) Human rights and freedoms can be enjoyed only when they are guaranteed by the right to take legal action. However, this right is circumscribed by the strict conditions defined by jurisprudence, which may be summarized as follows: so far as admissibility with respect to the person bringing the action is concerned, the applicant must be competent, entitled to act and have a positive, concrete, legitimate, legal and present interest in the case; so far as admissibility with respect to the object is concerned, the application must be in conformity with the law, must be submitted within a certain time and must have not yet been heard.

(25) Article 30 of the Universal Declaration of Human Rights clarifies article 29, paragraph 2, of that Declaration. The phrase

". . . everyone shall be subject only to such limitations as are determined by law solely for the purpose of . . ." is open to misinterpretation, since it implies that the limitations referred to can only be those expressly provided for by law. In fact, over and above the limitations established by law, it must always be borne in mind, as regards the State, the Group and the individual, that rights and freedoms can in no circumstances be disregarded and that nothing can justify their violation.

SOMALIA

[*29 January 1976*]

(1) The Charters of 1969 and 1971, issued by the Supreme Revolutionary Council, have the character of a constitution in Somalia and have replaced the pre-revolutionary Constitution, which was abolished by Decree No. 38 of 24 July 1970.

(2) In accordance with these Charters, exercise of fundamental rights and duties is guaranteed to all Somali citizens without any restrictions save those provided for by Somali laws and which are necessary to protect the national security of Somalia (Law No. 54 of 10 September 1970 and Public Order Law No. 21 of 26 August 1963), public health or morals, or the rights and freedoms of others.

(3) The restrictions referred to above are set out in various articles of the Penal and Civil Codes of Somalia.

SWEDEN

[*5 February 1976*]

(1) The Swedish Constitution provides that regulations relating to certain specified matters must be established by law. Such matters include provisions on the relationship between individuals and the community that concern obligations for the individual or otherwise interfere with his personal or economic affairs. The basic provision on the subject is found in chapter 8, article 3, which reads:

> "Provisions concerning the relations between private subjects and the community which concern obligations incumbent upon private subjects or which otherwise interfere in the personal or economic affairs of private subjects shall be laid down by law.
>
> "Such provisions are, *inter alia*: provisions which restrict the freedoms or rights, or such other protection which is granted Swedish nationals under Articles 1 to 3 of Chapter 2, provisions regarding criminal acts and the legal consequences of such acts, provisions regarding taxes payable to the State, and provisions regarding requisition and other such disposition."

(2) However, the Constitution empowers Parliament to a certain extent to authorize the Government, by law, to issue regulations, in the form of decrees, on the matters dealt with in article 3. The areas within which such authorization may be given are defined in the Constitution.

(3) Similarly, provisions concerning the status of individuals and their interrelationships must be laid down by law. Thus, chapter 8, article 2, reads:

> "Provisions relating to the personal status of private subjects or to their personal and economic interrelationships shall be laid down by law.
>
> "Such provisions are, *inter alia*:
>
> "1. provisions concerning Swedish citizenship;
>
> "2. provisions concerning the right to a family name, or concerning marriage and parenthood, heritage, and testaments, or other family affairs;
>
> "3. provisions concerning the right to real estate and movable property, concerning contracts, or concerning companies, associations, communities and foundations."

(4) It should be noted that, according to the Constitution, Parliament alone enacts laws. Any adopted Act of law must be promulgated by the Government without delay. Furthermore, no law may be amended or repealed except by law.

(5) Courts and administrative authorities have a certain controlling function in respect of the compatibility of laws and regulations with the Constitution. It is, for instance, incumbent on them to satisfy themselves that the Government acts within its competence when issuing regulations in the form of decrees. Similarly, when applying laws enacted by Parliament, courts and administrative authorities must make a formal examination of the laws. Theoretically, they must examine not only whether an Act of law has been adopted and whether, from a formal point of view, the decision was taken in conformity with the Constitution, but also whether the content of the law is in conformity with the Constitution. It is true, however, that the courts and administrative authorities have displayed great caution in using their prerogative to examine the compatibility of laws and regulations with the Constitution, and it is generally held that a law should only be set aside if it is manifestly in conflict with the Constitution.

(6) The Constitution embodies a number of provisions safeguarding human rights and fundamental freedoms. These provisions are reproduced below:

"*Chapter 2. Fundamental freedoms and rights*

"*Article 1.* Every citizen shall in relation to the community be guaranteed:

"1. the freedom of expression and the freedom of the press: the freedom to communicate information and express opinions either orally, in writing, in pictorial representations, or in any other way,

"2. the right to information: the right to obtain and receive information,

"3. the freedom of assembly: the freedom to arrange and to participate in meetings,

"4. the right to demonstration: the right to express opinions on public grounds, either individually or in groups,

"5. the freedom of association: the freedom to join with others in unions,

"6. the freedom of religion: the freedom to join with others in religious communities and to practice one's religion;

"7. the freedom of movement: the freedom to move within the Realm and to leave the Realm.

"*Article 2.* Every citizen shall be protected against any public authority compelling him to belong to any association or religious community or to make known his opinions.

"*Article 3.* Every citizen shall be protected against being subjected by any public authority to bodily search or other forced encroachment on his body, to any search of his home, or to any encroachment on his correspondence or on his postal or telecommunications, or to eavesdropping.

"*Article 4.* With regard to the freedom of the press and the right to have access to public documents, the Freedom of the Press Act shall apply. Other provisions elaborating more in detail the freedoms and rights and the protection referred to in Articles 1—3 shall be enacted in the manner prescribed in Chapter 8.

"*Article 5.* Any trade union and any employer or association of employers shall have the right to take strike or lock-out action or any similar measures, except as otherwise provided by law or ensuing from a contract."

". . .

"*Chapter 8. Laws and other regulations*

"*Article 1.* No law or other regulation may imply that a sentence for capital punishment can be pronounced.

"No law or other regulation may imply that it shall be possible to expel a Swedish national from Sweden or otherwise prevent a Swedish national from returning to Sweden, or that it shall be possible to deprive a Swedish national who is resident in Sweden of his citizenship except in a case where he is or at the same time becomes a national of another state.

"No law or other regulation may imply that it shall be possible to impose a penalty or other penal sanction on account of an act which was not subject to any penal sanction at the time it was committed, or to impose a more severe penal sanction on account of the act than that which was prescribed at that time. What has thus been provided with respect to penal sanctions shall likewise apply with respect to confiscation or any other special legal effects attached to criminal acts.

"Any private subject shall be guaranteed the right to obtain compensation, according to principles to be determined by law, in case his property is requisitioned by way of expropriation or other such means of disposition."

". . .

"*Chapter 11. Judicial and general administration*

"*Article 1*. . . .

"A court other than the Supreme Court or the Supreme Administrative Court shall be instituted by virtue of law. No court may be instituted for an act already committed, nor for a particular dispute or otherwise for a particular case.

". . .

"*Article 3*. . . .

"If an authority other than a court has deprived a person of his liberty on account of a criminal act or a suspicion of such act, such person shall be entitled to have the matter tried by a court without undue delay. This provision shall likewise apply if a Swedish national for any other reason than mentioned above has been coercively taken into custody. In the last-mentioned case, an examination by a board shall rank equally with the trial of a court, provided that the composition of the board is governed by rules of law and the chairman of the board shall be or shall have been a permanent judge."

(7) The question of the constitutional protection of fundamental rights and freedoms has not been finally determined but is still under consideration. A Government Commission was appointed in 1973 with the task of studying, *inter alia*, the possibility of extending the protection given by the Constitution to fundamental rights and freedoms. In 1975, this Commission submitted its report, in which it proposed extended constitutional protection for various fundamental rights. These proposals are at present being considered by the Government. Provisions which elaborate in more detail, or which restrict, the rights and freedoms embodied in articles 1 to 3 of chapter 2 may be enacted by law. The other provisions relating to fundamental rights and freedoms may, however, be amended only in the manner set forth in the Constitution for the amendment of fundamental laws, i.e. by way of two identical decisions by Parliament.

(8) Notwithstanding the provisions of article 3 of chapter 8, the Government may, according to article 7 of the same chapter, with authorization by law, issue regulations by way of decrees concerning matters other than taxes, provided that the regulations relate to such issues as, *inter alia*: (*a*) protection of life, personal security or health; (*b*) foreigners' residence or sojourn in the realm; (*c*) order on public grounds; and (*d*) teaching and education. In any of these matters, the Government may, upon authorization by law, also prescribe by way of decrees that one or more provisions of such law shall commence or cease to be applied. This shall apply even if the relevant provision restricts any of the freedoms or rights or such other provision which is granted to Swedish nationals under articles 1 to 3 of chapter 2.

(9) Furthermore, the Government may also, upon authorization by law, issue regulations by way of decrees prohibiting the disclosure of matters about which a person has acquired knowledge during public service or in the fulfilment of public duties. An authorization, as mentioned under this paragraph, shall not, however, include the right to issue regulations which in any respects other than those indicated in the preceding sentence restrict any of the freedoms or rights or such other protection as is granted to Swedish nationals under articles 1 to 3 of chapter 2. Nor shall such authorization include the right to issue regulations providing for any legal consequence of a criminal act other than fines. Regulations issued by the Government by virtue of authorizations shall be submitted to Parliament for examination and approval, if Parliament so decides.

(10) Sweden has, subject to only a few reservations, adhered to several conventions and agreements in the field of human rights, for example, the Euopean Convention on Human Rights, the International Covenant on Economic, Social and Political Rights and the International Covenant on Civil and Political Rights. The ratification of these instruments did not make it necessary to enact any new legislation, but the obligations undertaken were considered to be in conformity with existing laws.

(11) Most of the provisions governing the obligations in these instruments allow restrictions and other limitations to be made, for instance when these restrictions are prescribed by law and are necessary in a democratic society in order to safeguard various enumerated interests. From what has been said earlier, it is clear that according to the Swedish Constitution such restrictions must be established by law or upon authorization by law. No special observations will be made in this connexion with regard to the notions and terms used to denote these interests, but guidance will have to be sought in this respect in the preparatory work on the instruments.

(12) It should be recalled that, to deal with cases in which a person considers himself to be treated in a manner contravening obligations which Sweden has undertaken under the above-mentioned instruments, Sweden has recognized: (*a*) the right of an individual to lodge applications with the European Commission of Human Rights, as well as the compulsory jurisdiction of the European Court of Human Rights (articles 25 and 48 of the European Convention); (*b*) the competence of the Human Rights Committee established in accordance with the International Covenant on Civil and Political Rights to receive and consider communications to the effect that a State party claims that Sweden is not fulfilling its obligations under the Covenant; and (*c*) the competence of the above-mentioned Committee, in accordance with the Optional Protocol to the International Covenant on Civil and Political Rights, to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by Sweden of any of the rights set forth in the Covenant.

(13) Individuals (Swedish nationals and aliens) who claim that their rights and freedoms as set forth in these instruments have been violated not only have an effective remedy before a national authority but may also submit their cases to international organs. The individual has by these means been afforded adequate opportunities for the safeguarding of his interests; for example, he may have an impartial investigation carried out in order to ascertain if Sweden has unduly restricted certain rights and freedoms.

(14) There are a great many tasks incumbent upon the administrative—State, regional or local—authorities which are of the nature of services in which the element of administration of law is insignificant or non-existent. Many of these authorities, however, also apply rules of law of great importance to private subjects. The decisions of the administrative authorities in matters of law can normally be appealed against, and the examination of an appeal is in many cases a matter for an administrative court.

(15) Furthermore, Parliament shall elect one or more ombudsmen (there are currently three) for the purpose of supervising the application of laws and other statutes in public service. An ombudsman may initiate legal proceedings under penal law against a civil servant, but where he finds that there are grounds for criticism he may also confine himself to a mere statement. Complaints may also be submitted to the Chancellor of Justice, who is appointed by the Government but whose functions are in this respect similar to those of the parliamentary ombudsmen.

THAILAND

[*22 September 1975*]

(1) The Constitution recognizes the following individual rights and freedoms: the right and freedom to follow one's choice of religious belief; the right to speech, writing, printing and publication; the right to education; freedom of assembly; freedom of communication; freedom to form associations; and freedom to form political parties. By exercising these rights the individual is able to fulfil his duty to man and to the community.

(2) The fact that the above-mentioned rights and freedoms are recognized by the Constitution means that the individual's exercise of them must be respected by others.

(3) Section 53 of the Constitution specifies that no person shall exercise his rights and freedoms in opposition to the nation, religion, the King or the Constitution.

(4) Derogations from human rights are prevented by section 312 of the Penal Code, according to which slavery or the causing of any person to be in a position similar to that of a slave is liable to punishment or imprisonment, and torture or any inhuman treatment of a person is deemed a crime. Under section 35 of the Constitution, any statement obtained by torture, threat, coercion or any act which causes the statement to be made involuntarily is inadmissible evidence.

(5) According to section 6 of the Constitution, any law which contradicts or is inconsistent with the Constitution is deemed unenforceable and, in the event of doubt, the decision of the Constitutional Tribunal is deemed final.

(6) Section 2 of the Penal Code stipulates that a person shall be criminally punished only when his offence is deemed a criminal offence by law. The punishment inflicted must be in accordance with

the terms established by the law in force at the time the offence was committed.

(7) The Legislative Assembly may issue a law restricting individual rights and freedoms only where this is permitted by the Constitution, as, for instance, in such cases as the employment of forced labour for the purpose of ensuring national security, expropriation for purposes of public utility or public interest (including land reform), or prohibition of the right of assembly during a state of armed conflict, war or emergency.

(8) The administrative and executive authorities may restrict the rights and freedoms of the people only within the limits established by law.

(9) Only the court can exercise judicial power, and an injured party has the right of acess to the court in accordance with section 55 of the Code of Civil Procedure and sections 3, 4, 5 and 6 of the Code of Criminal Procedure. The right of a married woman to lodge a complaint is exercised through her husband and that of a minor child through his legal guardian.

(10) Section 36 of the Constitution provides that when a criminal court case has been completed, an appeal for a retrial may be lodged. If at the retrial the defendant is proved innocent, he is entitled to compensation and the restoration of rights.

(11) Section 40 of the Constitution prohibits the exercise of freedom in speech, writing, printing and publications if such exercise injures the rights of others, their freedom, honour and reputation, or if it would have an adverse effect on the moral or physical well-being of the public. Section 40 further prohibits exercise of those freedoms to cause public disorder.

(12) Section 43 of the Constitution provides that the right to assemble peacefully and without arms must not jeopardize the maintenance of public order or deprive the general public of the use of public places.

(13) No particular restrictions on the exercise of rights and freedoms have been imposed for the protection of "welfare", but section 88 of the Constitution provides that the State must promote and support public and private social works for the welfare and happiness of the people. Section 86 provides that the State must adopt a demographic policy appropriate to natural resources and economic and social conditions and must promote technology for the purpose of economic and social development and national security. Section 92 provides that the State must promote public health, including family health, and take care of the health of individuals. Section 93 provides that the State must keep the environment clean and eliminate pollution which jeopardizes the health of the people.

(14) Section 40 of the Constitution stipulates that restrictions may be imposed on the freedoms of speech, writing, printing and publication in the interest of national security, and section 86 recognizes State responsibility for national security through economic and social development.

(15) Section 37 of the Constitution states that the use of forced labour is prohibited except for the purposes of averting imminent public calamity.

(16) As to the application of article 30 of the Universal Declaration of Human Rights in relation to the provisions of article 29, an observation must be that injustice must not prevail as the result of allowing individuals or the State to enjoy unlimited rights and freedoms.

Ukrainian Soviet Socialist Republic

[*8 June 1976*]

(1) In the Ukrainian SSR, under the Constitution of the Republic, citizens are granted and guaranteed a broad range of human rights and freedoms in the political, social, economic and cultural spheres.

(2) The freedom of the individual and his full and comprehensive development under socialism are not the same thing as giving free reign to the individual will. The interests of society as a whole require the establishment of specific norms of conduct binding on all and some limitation of the interest of the individual in favour of social interests.

(3) In the Ukrainian SSR, this can be seen from the fact that, where appropriate, the State ensures the protection of citizens' individual rights from unlawful infringement by particular organs of the State and officials, as well as by citizens. It lays down various forms of sanctions against persons breaking the laws of the Ukrainian SSR. For example, criminal law lists criminal acts and lays down corresponding punishment. The norms contained in the criminal law and criminal procedure, administrative and corrective-labour laws provide for cases where certain limitations on the actions of a citizen which might damage the rights and interests of other members of society, as laid down by law, are necessary and permissible in the interests of society.

(4) These legal limitations of individual inviolability include those specially imposed for this purpose by authorized competent State organs (the Deputy Public Prosecutor's Office, the militia, etc.) in the cases and in the manner prescribed by law. These limitations, however, do not constitute violations of citizens' rights in respect of which the necessary legal measures are adopted.

(5) Thus, the rights and freedoms of citizens in the Ukrainian SSR may be subject only to the limitations provided for by law in order to ensure the necessary recognition of and respect for the rights and freedoms of others and to satisfy the justified requirements of morality, social order and the general welfare of the socialist society.[65] This is fully in accordance with the provisions of article 29, paragraph 2, of the Universal Declaration of Human Rights.

Union of Soviet Socialist Republics

[*6 May 1976*]

(1) Relations between a socialist State and the citizen are formed on the basis of unity and co-operation between the individual and society.

(2) The harmonious combination of State and individual interests in social life under socialism represents one of the most important elements of socialist democracy.

(3) Socialist democracy grants to the workers the widest rights and liberties on the basis of equality, without any discrimination whatsoever. These rights are assured and guaranteed by the socialist structure and by society as a whole, with which the individual is indissolubly linked in all fields and spheres of his activity.

(4) Constitutional rights and freedoms in socialist society lay down the rights of citizens to receive from the State and society the necessary material conditions for their existence, the satisfaction of their socio-cultural and spiritual needs, their participation in the control of social and State affairs, and their personal freedom.

(5) Chapter 7 of the Constitution[66] sets forth the basic rights, freedoms and duties of citizens of the USSR.

(6) The following provisions of the Constitution, among others, provide for limitations or restrictions on the exercise of certain human rights:

> "*Article 39* (second paragraph). Enjoyment by citizens of their rights and freedoms must not be to the detriment of the interests of society or the state, or infringe the rights of other citizens."
>
> "*Article 55*. Citizens of the USSR are guaranteed inviolability of the home. No one may, without lawful grounds, enter a home against the will of those residing in it."
>
> "*Article 65*. A citizen of the USSR is obliged to respect the rights and lawful interests of other persons, to be uncompromising towards anti-social behaviour, and to help maintain public order."

(7) The Constitution provides further for the following remedies available to citizens against violations of their rights and freedoms:

> "*Article 57* (second paragraph). Citizens of the USSR have the right to protection by the courts against encroachments on their honour and reputation, life and health, and personal freedom and property."
>
> "*Article 58*. Citizens of the USSR have the right to lodge a complaint against the actions of officials, state bodies and public bodies. Complaints shall be examined according to the procedure and within the time-limit established by law.
>
> "Actions by officials that contravene the law or exceed their powers, and infringe the rights of citizens, may be appealed against in a court in the manner prescribed by law.

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[65] In this connection, see the relevant provisions of the new Constitution of the USSR, adopted on 7 October 1977, in the comments of the Government of the USSR, below.

[66] The references to the Constitution have been updated; the quoted articles are from the *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics*, adopted at the seventh (special) session of the Supreme Soviet of the USSR, Ninth Convocation, on 7 October 1977 (Moscow, Novosti Press Agency, 1977). See also above, part one, para. 95.

"Citizens of the USSR have the right to compensation for damage resulting from unlawful actions by state organizations and public organizations, or by officials in the performance of their duties."

VENEZUELA

[*29 July 1976*]

(1) The notion of the community should comprise the State entity, made up of the following elements: territory, population and power.

(2) The population is composed of all persons in the territory, whether nationals or foreigners.

(3) Power is understood in two directions: from the top downwards, which prevents anarchy; and from the bottom upwards, which is the will of the people democratically expressed.

(4) In addition to the above-mentioned elements, which should comprise the State entity, there are others which must not be underestimated when analysing such a complicated reality as the State; for example, the unity of language, customs, institutions, folklore, history, etc., which shape the national sentiment.

(5) The community, identified with the reality of the State, imposes duties and limitations on individuals in the exercise of their rights. The following are among the limitations set by certain provisions of the Constitution:

(*a*) Limitations imposed by the principle of respect for the rights of others and for public order:

"*Article 43*. Every person shall have the right to the free development of his personality, subject to no limitations other than those deriving from the rights of others and from the public and social order."

(*b*) Sanitary inspections in accordance with the law:

"*Article 62*. The home shall be inviolable. It may not be broken into except to prevent the commission of a crime or to carry out decisions of the courts, in accordance with the law.

"Sanitary inspections which are to be made in conformity with the law shall not be carried out except after due notice has been given by the officials who order them or who are to make them."

(*c*) Limitations on the right to correspondence:

"*Article 63*. Correspondence in all its forms shall be inviolable. Letters, telegrams, private papers and any other means of correspondence shall not be seized except by judicial authority, subject to the fulfilment of the legal formalities and the maintenance in every case of due secrecy respecting domestic and private affairs that have no relation to the proceedings in course. Books, receipts and accounting documents may be inspected or audited only by competent authorities in conformity with the law."

(*d*) Limitations on the right to free movement:

"*Article 64*. Every person shall have the right to travel freely through the national territory, change his domicile or residence, leave the Republic and return thereto, bring his property into the country or take it out, with no other limitations than those established by law. Venezuelans may enter the country without the necessity of any authorization whatever. No act of public power may establish against Venezuelans the penalty of banishment from the national territory, except as commutation of some other penalty and at the request of the guilty party himself."

(*e*) Limitations on freedom of worship:

"*Article 65*. Every person shall have the right to profess his religious faith and to practise his religion, privately or publicly, provided it is not contrary to public policy or morality.

"Religious faiths shall be subject to the supreme inspection of the National Executive, in conformity with the law.

"It shall not be lawful to invoke religious beliefs in order to avoid complying with the laws or to prevent any person from exercising his rights."

(*f*) Legal limitation on freedom of thought:

"*Article 66*. Every person shall have the right to express his thoughts orally or in writing and to make use of any means of dissemination, without previous censorship; notwithstanding the above, if any person makes a statement which constitutes an offence, he shall be liable to penalty, in conformity with the law.

"Anonymity shall be forbidden. Propaganda in favour of war shall be prohibited and likewise propaganda offensive to public morality and propaganda for the purpose of inciting to disobedience of the laws; nevertheless, analysis or criticism of legal principles shall not be repressed."

(*g*) Limitations on the right of association:

"*Article 70*. Every person shall have the right of association for lawful ends, in conformity with the law."

(*h*) Limitations on freedom to meet with other persons:

"*Article 71*. Every person shall have the right to meet with other persons, publicly or privately, without previous permission, for lawful ends and without arms. Meetings in public places shall be governed by law."

(*i*) Social function of the right to own property:

"*Article 99*. The right to own property is guaranteed. By virtue of its social function, property shall be subject to the taxes, restrictions and obligations imposed by law for purposes of public benefit or the general interest."

(*j*) Limitation on the right to demonstrate:

"*Article 115*. Citizens have the right to demonstrate peacefully and without arms, subject only to the conditions established by law."

(6) Another way of limiting or restricting the exercise of human rights is by means of a decree suspending guarantees, when the country is considered to be in a state of emergency. The constitutional guarantees which may not be suspended are: the right to life; the right not to be sentenced to perpetual or infamous punishments; and the right not to be held incommunicado or subjected to torture or other treatment that causes physical or moral suffering.

(7) The judicial guarantees, also known as means of defence of the individual, in Venezuela are:

(*a*) Recourse to habeas corpus, provided for in the fifth transitional provision of the Venezuelan Constitution:

> ". . . the fifth transitional provision of the Venezuelan Constitution now in force provisionally establishes *amparo de la libertad personal* as a remedy against arbitrary or illegal detention; this is clearly another name for *habeas corpus* in its accepted sense. Indeed the Ministry of Justice has recently drawn up a 'Habeas Corpus Bill'.";[67]

(*b*) Recourse to the courts against acts of the Government. In Venezuela, actions relating to administrative acts are:

(i) Petition for annulment on grounds of illegality or abuse of power, provided for in article 121 of the Constitution:

"*Article 121*. The exercise of Public Power carries with it individual responsibility for abuse of power or for violation of the law."

(ii) Petition to the plenary court, which may be made in three ways:

a. To obtain reparation for damage or injury resulting from extra-contractual responsibility of the Administration;

b. To settle disputes arising out of the contracts entered into by the Administration, out of concessions granted by it, or out of its refusal to grant concessions to persons claiming a right thereto;

c. To secure the restoration of subjective legal situations impaired by administrative action.[68]

The last-mentioned petitions are heard by the Sala Politico-Administrativa (Political-Administrative Division) of the Supreme Court of Justice, in accordance with the fifteenth transitional provision of the Constitution.

(8) Petitions on grounds of unconstitutionality: in Venezuela, this action takes two forms: verification of the Constitution in a particular case at the request of a party or of the authorities; and popular action to secure a declaration of unconstitutionality, which is provided for in paragraphs 3 and 4 of article 215 of the Constitution:

"*Article 215*. The Supreme Court of Justice shall have the following functions:

". . .

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[67] H. Fix Zamudio, "Latin American procedures for the protection of the individual", *Journal of the International Commission of Jurists* (Geneva), vol. IX, No. 2 (December 1968), p. 69.

[68] E. Lares Martínez, *Manual de derecho administrativo*, 2nd ed. (Caracas, Universidad Central de Venezuela, 1970), p. 563.

"3. To declare the total or partial nullity of national laws and other acts of the legislative bodies that are in conflict with this Constitution;

"4. To declare the total or partial nullity of state laws, municipal ordinances and other acts of the deliberative bodies of the states and municipalities that are in conflict with this Constitution."

(9) The jurist Fix Zamudio states the following with respect to popular action to secure a declaration of unconstitutionality, for which provision is made in Venezuela's constitutional law:

> ". . . any citizen, even though he is not directly affected, may appeal to the Supreme Court . . . to declare unconstitutional laws that he alleges to be contrary to the Constitution. If such a declaration is made by the Supreme Court, it becomes binding upon all persons."[69]

(10) With regard to the supremacy of the Constitution, the Supreme Court of Justice has stated the following:

> ". . . the National Constitution itself, which is the primordial source of every law, so that there can be no rule which conflicts with that supreme law which is the fundamental charter of the nation".[70]

(11) With regard to action to secure a declaration of unconstitutionality, it has expressed the following opinion:

> "If the principal action is for a declaration of nullity of a law or ordinance, the action must be brought before the Supreme Court of Justice, sitting in plenary, or before the Sala Politico-Administrativo of the Supreme Court, as the case may be. But if, in any action, a request is made for application of a law, ordinance, or any administrative act, it is sufficient for the defendant, if he considers such law, ordinances or acts to be in conflict with the National Constitution, to plead that the Constitution must prevail; and if it is found that the Constitution has indeed been infringed by such legal or administrative provisions, any judge is competent so to declare, for the purposes of the case in question only, unlike a declaration by the Supreme Court made pursuant to popular action, which takes effect *erga omnes*."[71]

(12) Verification of the Constitution in a particular case is provided for in the Code of Civil Procedure, in the following terms:

> "*Article 7*. When the law in force, application of which is requested, conflicts with any provision of the Constitution, the Courts shall apply the latter preferentially."

(13) Even if it is not requested by the parties, such a declaration of inapplicability must be made by the authorities in virtue of the obligation to uphold the supremacy of the Constitution. But inapplicability of a conflicting law may not be declared generally and absolutely, *erga omnes*; hence the disputed law remains in force and is applied in any other cases until it has been declared null and void, on grounds of unconstitutionality, by the Supreme Court of Justice, which has exclusive competence. To sum up, this provision empowers the ordinary court judges to verify the Constitution as and when required in cases they try, giving preference to its rules over any other provision of positive law, but only in the particular case being tried. Their judgement has suspensive and temporary effects in the case at issue, but never results in nullity.[72]

D. Comments by specialized agencies relating to limitations on the exercise of human rights and fundamental freedoms

97. The Secretary-General, on behalf of the Special Rapporteur, transmitted to specialized agencies a questionnaire in connection with the present study. The following information relating to limitations on the exercise of human rights and fundamental freedoms was received in response to the questionnaire:[73]

INTERNATIONAL LABOUR ORGANISATION
(ILO)

[*17 September 1975*]

(*a*) *Provisions of international labour conventions relating to limitations on rights and freedoms*

(1) The International Labour Conference and the ILO supervisory bodies have consistently applied the general principle that limitations on or derogations from the protection afforded and rights granted by international labour conventions can only be imposed under the express terms of the conventions themselves.

(2) Provisions authorizing such limitations or derogations in precisely defined circumstances are to be found in the following conventions, classified by subject-matter:

Fundamental human rights

Forced Labour Convention, 1930 (No. 29), art. 2, para. 2;

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) arts. 8 and 9;

Right to Organise and Collective Bargaining Convention, 1949 (No. 98), art. 5;

Discrimination (Employment and Occupation) Convention, 1958 (No. 111), art. 4;

Hours of work and related matters

Hours of Work (Industry) Convention, 1919 (No. 1), art. 14;

Night Work of Young Persons (Industry) Convention, 1919 (No. 6), art. 7;

Weekly Rest (Industry) Convention, 1921 (No. 14), art. 4;

Hours of Work (Commerce and Offices) Convention, 1930 (No. 30), art. 9;

Hours of Work and Rest Periods (Road Transport) Convention, 1939 (No. 67), art. 19;

Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 79), art. 4, para. 2;

Night Work (Women) Convention (Revised), 1948 (No. 89), art. 5;

Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90), art. 5;

Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), art. 13.

Miscellaneous

Labour Clauses (Public Contracts) Convention, 1949 (No. 94), art. 8;

Indigenous and Tribal Populations Convention, 1957 (No. 107), art. 12, para. 1.

(3) Outside such specific cases, in accordance with the principle mentioned above, no limitations or derogations are permitted, nor are ratifications subject to reservations possible. Certain conventions do contain flexibility devices to take into account the differing levels of development of ILO members and to make ratification possible before the full level of protection provided for in the convention concerned is reached. Provisions of this kind, which are designed to permit the gradual attainment of the standards laid down, are not included in the present comments, which concentrate on the limitations that may be imposed in the interests of the community.[74]

(b) *Jurisprudence relating to limitations on rights and freedoms*

Convention No. 29

(4) The limitations on freedom from forced labour which result from the individual's duty to the community have already been examined.[75]

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[69] Fix Zamudio, *loc. cit.*, p. 76.

[70] A. R. Brewer-Carias, *Jurisprudence de la Corte Suprema, 1930–1974*, and *Estudios de derecho administrativo*, vol. I, *Ordenamiento constitucional y funcional del Estado*, p. 85.

[71] J. Garay and H. Ramírez Letourneau, *Jurisprudencia Venezolana*, 1968, 1st semester (Caracas, Ramírez and Garay, 1968), vol. XVIII, p. 350.

[72] *Código de Procedimiento Civil Venezolano*, with commentary by Dr. Armando Hernández Bretón, 5th ed. (Caracas, Editorial "La Torre").

[73] The replies of the specialized agencies were received on the dates shown in parentheses following the name of the agency.

[74] In connection with the ILO and human rights, see, for example, the important contribution made by N. Valticos, "The role of the ILO: present action and future perspectives" in B.G. Ramcharan, ed., *Human Rights: Thirty Years after the Universal Declaration* (The Hague, Martinus Nijhoff, 1979), pp. 211–231.

[75] See the comments of ILO in part one, para. 65.

Convention No. 105

(5) Although it does not make provision for limitations, article 1 of Convention No. 105 is relevant to the question of limitations on rights. Ratifying States undertake to suppress forced or compulsory labour, *inter alia*, as a means of political coercion or education or as a punishment for holding or expressing political or ideological views; as a means of labour discipline; or as a punishment for having participated in strikes.

(6) The Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts)[76] has recognized that this provision does not extend to punishment imposed as a result of infringements of the normal limitations on the rights and freedoms concerned which must be accepted as normal safeguards against their abuse, and has referred in this regard to article 29 of the Universal Declaration of Human Rights, indicating that it appears appropriate to take account of corresponding criteria in evaluating national law and practice in fields relevant to the prohibition of forced or compulsory labour as a means of political coercion or education or as a punishment for holding or expressing political or ideological views (Report of the Committee of Experts, 1968, part three, para. 90).

(7) As far as punishment for breaches of labour discipline with penalties involving an obligation to perform work is concerned, the Committee of Experts has considered it appropriate to distinguish between penalties imposed to enforce labour discipline as such (which the Convention requires to be suppressed) and penalties imposed for the protection of the general public interest, although arising out of an act consitituting a breach of labour discipline. Accordingly, no incompatibility with the Convention is considered to arise where penalties (even if involving compulsory labour) are imposed for breaches of labour discipline in certain circumstances, such as breaches impairing the operation of essential services or breaches committed in certain posts essential to safety or in circumstances where life or health are endangered (*ibid.*, para. 93).

(8) Similarly, while the Convention prohibits forced or compulsory labour as a punishment for having participated in strikes, the Committee of Experts, on the basis of preparatory work, does not consider it incompatible with its terms to impose penalties, even if involving an obligation to work, for participation in strikes in essential services, i.e. those whose interruption would endanger the existence or well-being of a part or the whole of the population, provided that appropriate alternative procedures for the settlement of disputes are provided. Similar restrictions may be imposed, even in other undertakings or services, on persons occupying certain posts essential from the point of view of safety. Strikes may also be prohibited in emergencies, provided the duration of the prohibition is limited to the period of immediate necessity (*ibid.*, para. 95).[77]

Convention No. 87

(9) Article 8 of Convention No. 87 requires employers and workers and their organizations, in exercising the rights provided for in the Convention, to respect the law of the land, but at the same time lays down that the law of the land shall not be such as to impair those rights nor shall it be applied so as to impair them. It has been emphasized that these provisions have a positive content, namely, to prevent the law or its application from encroaching on the rights recognized in the Convention.[78]

(10) In examining the application of these provisions, the Committee of Experts does not content itself with examining the legislation relating to trade unions, but refers also to more general legislation which may have a bearing on the guarantees provided for in the Convention (Report of the Committee of Experts, 1959, part three, para. 157). It attaches particular importance to national legislation governing the exercise of those civil liberties which are closely linked with the effective enjoyment of freedom of association, in particular freedom of assembly, freedom of expression and opinion, freedom from arbitrary arrest and the right to a fair trial, and freedom from arbitrary interference with privacy. As to freedom of assembly, the Committee of Experts has indicated that "it rests with the authorities, who are responsible for the maintenance of public order, to decide whether meetings, including trade union meetings, may in special circumstances endanger public order and security and to take adequate measures".[79] As far as freedom of expression is concerned, the Committee of Experts has pointed out that it would be affected by prior censorship of all means of communication and publication of trade union views, and that administrative measures for the control of publications and information and the granting and revoking of licences should be subject to judicial review.[80] Freedom of trade unionists from arbitrary arrest can only be ensured if arrest and detention are accompanied by adequate judicial safeguards, and, in cases of preventive detention of trade unionists under special powers in periods of emergency, such measures should be justified by the existence of a serious emergency and accompanied by adequate judicial safeguards applied within a reasonable period.[81] Similarly, searches of trade union premises or the homes of trade unionists should only be made in accordance with ordinary judicial procedures guaranteeing adequate safeguards.[82]

Convention No. 111

(11) Article 4 of Convention No. 111 provides that any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided there is a right of appeal.

(12) The Committee of Experts has held, first, that this requirement excludes any measures taken not because of individual activities but by reason of membership of a particular group or community; secondly, that it applies only to "activities" (which must be proved or justifiably suspected on sufficiently serious grounds); and, thirdly, that it rests on the protection of "the security of the State", which should be sufficiently narrowly defined to avoid the risk of coming into conflict with the policy of non-discrimination (Report of the Committee of Experts, 1963, part three, para. 47). In particular, measures designed to protect the security of the State should be clearly defined and so worded as not to form a basis for discrimination based solely upon political opinion (*ibid.*, 1971, part three, para. 38). Even in the case of legislation based on the wording of the Convention itself, the Committee of Experts would be concerned to refer to other provisions of the national legislation which would clarify the circumstances in which a worker could be accused of or sentenced for engaging in an activity prejudicial to the security of the State (*ibid.*, 1974, part three, p. 192).

(13) Secondly, the Committee of Experts has held that the requirement of "a right of appeal to a competent body established in accordance with national practice" (art. 4) of necessity presupposes the observance of certain minimum criteria: first, the body to which appeals can be made should be independent from administrative or governmental authorities, so that a mere right of appeal to the administrative or governmental authority hierarchically superior to the authority that took the measure would not be enough; secondly, this body should offer guarantees of independence and impartiality, and should be in a position to ascertain the reasons underlying the measures taken and give the appellant facilities for fully presenting his case (*ibid.*, 1963, part three, para. 48).

(14) The provisions of Conventions Nos. 1, 6, 14, 30, 67, 79, 89, 90, 94 and 106, concerning the hours of work and related matters, allow, in varying terms, for the suspension of the protection required under Convention No. 111 when in case of war or other emergency the national safety is endangered or the national interest requires it. In examining the application of these Conventions, the Committee of Experts, in requests addressed directly to the Governments concerned, has indicated that it does not consider legislation in the

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[76] The report of the Committee of Experts on the Application of Conventions and Recommendations is published each year as Report III (Part 4) to the International Labour Conference.

[77] For a fuller description of the practice of the Committee of Experts in relation to limitations of the kind described above, reference may be made to the Report, 1968, part three, paras. 75–131.

[78] See "Comparative analysis of the International Covenants on Human Rights and International Labour Conventions and Recommendations", ILO, *Official Bulletin*, vol. LII, 1969, No. 2, para. 54 (*b*); and *Trade Union Rights and their Relation to Civil Liberties* (Geneva, International Labour Office, 1969), International Labour Conference, fifty-fourth session, report VII, p. 23.

[79] *Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of Conventions and Recommendations* (Geneva, International Labour Office, 1973), International Labour Conference, fifty-eighth session, report III (part 4B), para. 133.

[80] *Ibid.*, para. 134.

[81] *Ibid.*, para. 135.

[82] *Ibid.*, para. 136.

following terms compatible with provisions of this kind:

Legislation permitting such exemptions as the Government may think fit in the public interest;

A provision under which exemptions could be permitted in respect of undertakings working for national defence purposes;

An exception in cases of *force majeure* likely to jeopardize the operation of the undertaking;

An exception for undertakings rendering services of public interest;

Exceptions granted for export purposes;

A suspension of the prohibition of night work to meet an acute manpower shortage;

Legislation permitting exemptions of undertakings if they would be unduly prejudiced by the prohibition;

Legislation permitting suspension of the prohibition if particularly important public, economic, social or other similar circumstances so warrant;

Suspension of the prohibition because of economic difficulties or unemployment.

(15) On the other hand, the Committe of Experts accepted legislation authorizing exceptions in the event of a catastrophe, imminent danger or public disaster.

(16) Apart from these specific provisions, it has been recognized that war or other serious emergencies may affect the possibility of giving effect to the terms of Conventions.

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS
(FAO)

[*10 September 1975*]

(1) With respect to limitations on the exercise of human rights and freedoms, there are undoubtedly instances where legislative, regulatory and administrative action in such areas as land tenure, agrarian reform, water management, environment protection, resource conservation and consumer protection will place certain restrictions on the exercise of property rights and, more generally, on the use of private or public resources. In this connection, it may be noted that the United Nations, ILO and FAO have jointly examined certain questions relating to possible changes in property and income distribution by a modification of existing fiscal legislation or laws of succession, which at present favour a relatively small segment of the population, thereby restricting access to scarce production resources and employment opportunities for many members of the community and thus restricting the exercise of human rights.[83]

(2) It may be noted that article 17 of the Universal Declaration of Human Rights is intended to protect the right to own property. However, article 29, paragraph 2, of the same Declaration permits limitations on the exercise of rights "for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". It would seem therefore that the criteria specified in article 29 could in general be invoked to justify restrictions placed on individuals by legislative and other measures taken by the authorities of member States in the fields mentioned above, with a view to promoting or protecting the interests of the community, in particular for furthering economic and social development.

UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANIZATION
(UNESCO)

[*3 September 1975*]

(1) In each of the major spheres of competence of UNESCO, the limitations on the exercise of an individual's rights and the enjoyment of his freedoms call for comments.

Education

(2) In this fundamental sphere, the problems which may arise in relation to article 29 of the Universal Declaration of Human Rights concern primarily access or admission to higher education. Article 26, paragraph 1, of the Declaration states that higher education "shall be equally accessible to all on the basis of merit". This wording, which is, doubtless intentionally, somewhat vague, has not been fully observed in a great many countries with widely differing social systems, in which admission to higher education is limited through various procedures and methods—either because of the number of places available or to prevent unemployment among graduates in certain sectors or specialized fields—even for individuals having the ability needed to complete higher studies with success.

(3) Whatever the reasons for these limitations, the authorities concerned usually refer to other provisions of the Universal Declaration of Human Rights in order to explain them; thus, the limitation of the budgets for higher education, which often limits the places available, is usually explained by reference to the overall situation of the national economy, in other words, to the "general welfare in a democratic society" (art. 29, para. 2); where entry is limited in order to meet the requirements of the employment market, article 23, paragraph 1, is usually cited ("Everyone has the right to work . . ."). Here, the right to work is interpreted, no doubt correctly, as a right to work in conformity with the abilities and level of training of the person concerned.

(4) The contradictions are obvious and it would be difficult to make an overall judgement on all the measures just referred to. It may nevertheless be recalled that the Second Conference of Ministers of Education of European Member States considered this problem and unanimously adopted certain general principles enabling the discriminatory character of selection measures which appear inevitable in certain contexts to be at least partially eliminated. These principles are contained in paragraph 7 of the conclusions of the Conference.[84]

(5) In addition, the Recommendation concerning education for international understanding, co-operation and peace and education relating to human rights and fundamental freedoms, adopted by the General Conference of UNESCO at its eighteenth session, contains provisions and concepts some of which may be regarded as restricting fundamental rights and freedoms.

(6) Thus, articles 10 to 16 of that Recommendation, concerning the ethical and civic aspects of apprenticeship, training and action, are in large part based on the spirit of article 26 of the Universal Declaration of Human Rights.

(7) The International Bureau of Education (BIE), for its part, prepared, as Recommendation No. 64, a document on education for international understanding as an integral part of the curricula and life of the school, which was adopted in 1968 by the Ministers of Education.

(8) Articles 24 and 25 of that document established principles for civic and moral instruction which reflect the aims of article 29 of the Universal Declaration.

(9) In 1972, UNESCO published a brochure entitled *Rights and Responsibilities of Youth* and in pursuance of resolution 1.322, adopted by its General Conference at its sixteenth session, organized in co-operation with the Danish authorities an international seminar on this subject from 15 to 21 May 1972.

Exact and natural sciences

(10) The Recommendation on the status of scientific researchers adopted by the General Conference at its eighteenth session also refers to certain limitations arising not only out of article 29 of the Universal Declaration but also out of article 27, paragraph 1, which reads: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

(11) In part III, on the initial education and training of scientific researchers, the above-mentioned Recommendation emphasizes the moral qualities (art. 10) and the spirit of devotion to the service of the community (art. 11 *b*) which a scientific research worker must have, and in articles 14 and 15 it describes the civic and ethical aspects of scientific research.

Culture

(12) Several international instruments have been adopted by the General Conference of UNESCO with the aim of protecting the world cultural and natural heritage. All these instruments are based on the principle of the responsibility of the individual, within the

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[83] See *Progress in Land Reform: Sixth Report* (United Nations publication, Sales No. E.76.IV.5).

[84] *Second Conference of Ministers of Education of European Member States, Bucharest, 26 November–3 December 1973: Final Report* (Paris, UNESCO, 1974), p. 22.

limits of article 29 of the Universal Declaration of Human Rights, for ensuring the preservation of the natural and cultural heritage of mankind in the interests of the national or international community. This principle implies, *inter alia*, some limitation on the right of property laid down in article 17 of the Universal Declaration, since, for example, it involves a prohibition on the damaging, or the illicit import or export, of artistic and cultural works.

(13) These instruments are:

(*a*) The Convention and Recommendation for the protection of the world cultural and natural heritage, adopted by the General Conference at its seventeenth session, on 16 November 1972;

(*b*) The Recommendation concerning the safeguarding of the beauty and character of landscapes and sites, adopted by the General Conference at its twelfth session, on 11 December 1962;

(*c*) The Recommendation on the means of prohibiting and preventing the illicit export, import and transfer of ownership of cultural property, adopted by the General Conference at its thirteenth session, on 19 November 1964; and

(*d*) The Recommendation concerning the preservation of cultural property endangered by public or private works, adopted by the General Conference at its fifteenth session, on 19 November 1968.

Communications

(14) The considerations which follow regarding "the right to communicate" can be seen to apply more directly to article 19 of the Universal Declaration of Human Rights; they can also been seen to be intimately involved in articles 12, 13 and 27, and it is possible that the analysis of the right to communicate might involve many considerations under article 29.

(15) One new UNESCO programme is the result of a resolution adopted by the General Conference at its eighteenth session, which authorized the Director-General "to study ways and means by which active participation in the communication process may become possible and analyse the right to communicate in consultation with competent organs of the United Nations, Member States and professional organizations and to report to the nineteenth session of the General Conference on further steps which should be taken". An in-depth study of this complex question will require a programme of research and gradual formulation and testing over a considerable period of time.

(16) The right to communicate is a new concept which, so far, has been formulated only in a tentative and preliminary manner. It reflects the new dimensions which technological changes have added to the right to information proclaimed in the Universal Declaration of Human Rights in 1948, and the evolution of ideas on certain fundamental aspects of communication. The discussion of these issues must first be placed against the background of the changing world situation. There is a growing recognition of the interdependence of countries and societies and of the interrelatedness of the major issues facing humanity. The establishment of a new international economic order is now an accepted concept; it should, however, be recalled that the social aspect is at least as crucial as the economic aspect, and that there is a social dimension to the international order, just as there is to national development.

(17) This attitude is also reflected in the shift of emphasis in concepts and strategies for economic and social development. Fundamental to this approach is to place the human being at the centre of the development process. This leads to a recognition that development cannot take place without popular participation, involvement and motivation. The implications for communication are obvious.

(18) The new awareness of the role of communication as an indispensable element of all social organization has resulted in interest in aspects of the communication processes which previously have not been taken into account. Attention is now being given to such questions as the information flows between man and his total environment, physical as well as social, to the need for articulated, coherent communication policies, and to the biological and pyschological bases of human communication. At the same time, science and technology are bringing about changes so profound that expressions such as the "communication revolution" and the "information explosion" are in common usage.

(19) Factors such as these provide the context for the emergence of new or altered concepts in the communication field. There is now a tendency to reassess such concepts as the free flow of information, with a view to including the idea of balanced information, and to place the flow concept within the framework of access both to the media and to information. Similarly, there is a growing awareness of the need to go beyond the traditional concepts of "freedom of the press" or "freedom of information" in the sense of institutional rights and of one-way information and to emphasize needs of access and participation, of feed-back, and of not only two-way but also "multi-way" processes of information which are seen as essential to individuals and groups, as well as to States in their relations to one another and in their international involvements.

(20) Further reasons have been brought forward for considering traditional concepts and approaches to be less than adequate in present circumstances; these concepts have, in general, developed within the value system of one culture; they are often conditioned by a particular technology or level of technology; and they often relate to the protection of particular professional or interest groups.

(21) The inadequacy of traditional concepts is also demonstrated by the difficulties of achieving agreement or consensus at the international level. These difficulties are due not only to contrasting ideologies but also to differences of interpretation and emphasis arising out of different socio-economic conditions, perceived needs and priorities and legal traditions.

(22) The main effort in the work on the right to communicate should, therefore, consist of an attempt to evolve concepts and approaches in accord with a changing world situation. Basic to this approach would be a multi-cultural conceptualization; the application of new ideas and intellectual tools emerging in the communications and related areas; and attention both to technology and policy based on an assessment of the communication and information needs of societies and individuals.

(23) It is appropriate to recall, as a basis for this work, the general problem areas singled out by the UNESCO General Conference as being of main importance:

(*a*) Respect for human rights and the establishment of conditions for peace;

(*b*) Development of man and society;

(*c*) Balance and harmony of man and nature;

(*d*) Communication between people and the exchange of information.

(24) Thus, it can be seen that:

(*a*) The right to communicate is involved in many and varied issues which differ in kind and scope, are understood in different ways in different societies and apply at several levels of social organization;

(*b*) It concerns States in their relationship with other States and the world at large, as well as with their own citizens; communities in their relationship with citizens, the Government and other communities; the media with Government, information sources and the public; institutions and organizations and individuals with their total environment;

(*c*) Aspects of the right to communicate are to be found in general social, cultural and religious attitudes; in the constitutions of States, the policies, laws, regulations and activies of Governments at various levels; in the constitutions and rules of organizations; in the policies and practices of the information media. The right carries corresponding duties and responsibilities;

(*d*) From the point of view of the individual, the right to communicate raises such questions as the right and opportunity to speak and to be spoken to, to receive and to impart information. A corollary is the protection of certain personal rights, such as the individual's rights to privacy, and "not to be communicated with" if that is his wish.

Examples of standard-setting instruments that contain limitation clauses

(25) Among examples of standard-setting instruments that contain limitation clauses, a number adopted by the General Conference of UNESCO contain provisions which indicate that in appropriate situations the exercise by the individual of his human rights may be subject to certain necessary limitations. Some of these are mentioned below.

Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, adopted on 10 December 1948

(26) This Agreement, which seeks to promote the right to information recognized by article 19 of the Universal Declaration of

Human Rights and by article 19 of the International Covenant on Civil and Political Rights, provides in its article V that nothing in the Agreement shall affect the right of contracting States to adopt measures to prohibit or limit the importation of material for reasons of public security or order.

Agreement on the Importation of Educational, Scientific and Cultural Material adopted on 17 June 1950

(27) Article 5 of this Agreement affirms the right of contracting States to limit, in appropriate cases, the individual's right to information. The article provides that nothing in the Agreement "shall affect the right of contracting States to take measures, in conformity with their legislation, to prohibit or limit the importation or the circulation after importation of articles on grounds relating to national security, public order or public morals".

Convention against Discrimination in Education, adopted on 14 December 1960

(28) Under article 5(*b*) of this Convention, the right of parents and legal guardians to choose institutions for their children is limited to the extent that the institutions must conform to such minimum educational standards as may be laid down or approved by the competent authorities.

(29) Their right to choose the religious and moral education of the children in conformity with their own convictions is also restricted by the requirement that the rights must be exercised in a manner consistent with the procedures followed in the State concerned for the application of its legislation.

(30) While article 5 (*c*) recognizes the right of members of national minorities to carry out their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or teaching of their own language, this is subject to the proviso that; (*a*) this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty; (*b*) the standard of education is not lower than the general standard laid down or approved by the competent authorities; and (*c*) attendance at such schools is optional.

Recommendation against Discrimination in Education, adopted on 14 December 1960

(31) What is stated above in respect of article 5 (*b*) and (*c*) of the Convention against Discrimination in Education applies *mutatis mutandis* with regard to paragraph V (*b*) and (*c*) of this Recommendation.

Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, adopted on 19 November 1964

(32) Paragraph 3 of this Recommendation provides that, to ensure protection of its cultural heritage against all dangers of impoverishment, each member State should take appropriate steps to exert effective control over the export of cultural property as defined in the Recommendation. To the extent that this provision, if put into effect, would tend to restrict the manner of disposal of cultural property by the owners, it is a limitation on the right of those concerned to own property.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Ownership of Cultural Property, adopted on 14 November 1970

(33) Article 13 (*a*) of this Convention obliges States parties to the Convention to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property. This provision also, if implemented, would have the effect of limiting the enjoyment by the individual of one of the important incidences of ownership, namely, the right of an owner of property to transfer his property. Consequently, it could be said that the provision has a limitative effect on the right to property recognized by the Universal Declaration of Human Rights.

Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, adopted on 16 November 1972

(34) Under the terms of paragraphs 42 to 48, certain recommendations are made to member States with regard to the protection, at national level, of the cultural and natural heritage. The application of these recommendations could in certain cases result in a derogation of the property rights of the individual owners of the properties concerned.

Concluding remarks

(35) All the information submitted by member States on the question of limitations will be extremely useful, since no details of limitations and derogations have yet been compiled.

(36) With regard to the rights in respect of which no derogation is permitted under article 15 of the European Convention, article 4 of the International Covenant on Civil and Political Rights, article 27 of the Inter-American Convention and article 3 in each of the four Geneva Conventions of 12 August 1949, rights from which no derogations are permitted in all these instruments are called, in the chapter of the UNESCO manual which deals with the question, "the indestructible core of human rights", and the standards are regarded as having the nature of *jus cogens*. One question which arises in this context should be considered in the report: how to interpret a clause authorizing limitations on a human right which is part of an article from which no derogations are possible. For example, article 4 of the International Covenant on Civil and Political Rights states that there can be no derogation from article 18 in time of public emergency, yet article 18 itself contains a paragraph authorizing such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(37) The right to freedom of thought is one thing. The right to disseminate the results of one's thoughts exists only in societies which have established mechanisms to achieve domestic consensus without resorting to open censorship.

(38) The rule of law is influenced by the methods used in recruiting magistrates, the members of a court or a jury, and the police forces, as well as by inequality in arrests and by the way in which offenders are treated. Convictions may give rise to sentences and judgements that vary from one group to another, while a court decision may be influenced by access or lack of access to legal assistance, the possibility of using a favourable press, etc. The exercise of several of the notions and terms which constitute limitations on human rights has been the subject of court cases under the European Convention on Human Rights. The question whether the concept of "general welfare" should constitute the basis for imposing temporary limitations raises very interesting questions of emergency situations other than conflicts (insurrection, civil war, international war), particularly situations involving underdevelopment and natural catastrophes. To the extent that the United Nations is coming increasingly to recognize that respect for civil and political rights is impossible in underdeveloped countries without the protection of economic, social and cultural rights and that the latter cannot be protected in the present world economic system,[85] there would be a case for limitations on certain rights. This argument is adduced by the countries concerned mainly to justify restrictions on freedom of expression, freedom of association and the right to own property. Certain conditions are implicit in the application of such restrictions, in particular that they should be provided for in law, that they should be directly related to the strict requirements of development, that they should be applied without discrimination and exclusively to achieve the purpose intended, and that they should be in the interest of the population as a whole.

(39) The notions "morality", "public order", "democratic society", "public safety" and "national security" are meaningful only in a particular ideological and theoretical context. Thus, "morality" may consist of strict laws against abortion, "public order" may mean an increase of private surveillance, a "democratic society" may be a system of parties, proportional representation, one-man one-vote, direct popular democracy, constitutional monarchy, domination of the Church by the State or vice versa. "Public safety" and "national security" are notoriously very inexact terms. By definition, both are put at risk at times of revolutionary change, demands for seccession or independence, etc.

(40) Replies by Governments on the questions relating to limitations and restrictions on human rights could cover situations to

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[85] See, for example, *Final Act of the International Conference on Human Rights, Teheran, 22 April–13 May 1968* (United Nations publication, Sales No. E.68.XIV.2), Proclamation of Teheran, paras. 12 and 13, and resolution XVII; and Economic and Social Council resolution 1867 (LVI) of 17 May 1974.

which the relevant provisions of the Universal Declaration and the International Covenants would be applicable and information supplied would be very useful for the implementation of the International Covenants.

(41) The preparation of international standards establishing a system of limitations will probably prove necessary in the longer term. Guidelines could be laid down by the Sub-Commission on Prevention of Discrimination and Protection of Minorities or by the Commission on Human Rights, after consideration of the report of the Special Rapporteur, but the preparation of an instrument should wait until the International Covenants have been in force for some years.

World Health Organization
(WHO)

[*19 September 1975*]

(1) The individual is obliged to notify the health authorities when he is suffering from communicable diseases (including venereal diseases) or has been exposed to infection, and must undergo examination, treatment, surveillance, isolation or hospitalization. In particular, obligatory isolation or hospitalization in such cases constitutes a limitation on freedom of movement and the right to liberty and security of person.

(2) These matters are basically regulated by national legislation.

(3) The most significant enactments in these fields have been reproduced or summarized throughout the years since 1948 in the *International Digest of Health Legislation*.[86]

(4) In addition, a number of comparative studies of national legislation on certain subjects of relevance to the question of limitations in the exercise of human rights and freedoms have been published as separate issues of the *Digest*.[87]

(5) As regards jurisprudence concerning limitations on the exercise of human rights based, *inter alia*, on relevant instruments of WHO, mention should be made of the International Health Regulations.[88] These regulations, the purpose of which is to ensure the maximum security against the international spread of diseases with a minimum of interference with world traffic, result in certain limitations on freedom of movement due to the various requirements of vaccination, quarantine, etc. They are based on article 21 of the WHO Constitution.

(6) With respect to the meaning of the notion "general welfare" and its relation to the protection of "public health", attention should be paid to the broad concept of "health" laid down in the preamble to the WHO Constitution, which defines this term as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity", so that the role of WHO extends into the realm of social medicine and into such specific fields as mental health, public health, education, nutrition, housing, and maternal and child health and welfare. This broad concept may constitute a relevant factor for the interpretation of provisions allowing limitations to be placed on the exercise of human rights and freedoms by legislation for the protection of "public health" or the "general welfare".

E. Comments by regional organizations relating to limitations on the exercise of certain human rights and fundamental freedoms

98. The following comments, dated 12 January 1976, were received by the Special Rapporteur from the Council of Europe.

(a) *General comments*

(1) In the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights),[89] three types of provision deal, directly or indirectly, with the restrictions imposed on the rights and freedoms guaranteed by the text. First, some of the articles recognizing a particular right or freedom expressly stipulate the restrictions to be imposed thereon in certain circumstances; this is the case with articles 8 to 11 of the Convention, article 1 of the first Protocol and article 2 of Protocol No. 4 to the Convention. Then there are provisions of a more general character which, in substance, authorize restrictions on rights for other more general reasons; this is the case, in particular, with article 17 of the Convention, which prohibits abuse of the rights guaranteed by the Convention, and article 15, which authorizes special measures in time of war or other public emergency threatening the life of the nation. Thirdly, other provisions of a general character, such as articles 14 and 18 of the Convention, limit the application of the restrictions authorized under other articles.

(2) Articles 8 to 11 of the Convention, which are intended to define the area within which the individual enjoys freedom of action, make express provision for restrictions. These limitations or restrictions are authorized in certain conditions, both in form and in substance; if the conditions are met, the limitations or restrictions are permitted.

(3) The first condition is that the limitations or restrictions must be legal. They must be "in accordance with the law" (article 8 (2) of the Convention and article 2 (3) and (4) of Protocol No. 4), "prescribed by law" (articles 9 (2), 10 (2) and 11 (2) of the Convention), or "subject to the conditions provided for by law and by the general principles of international law" (article 1 of the first Protocol to the Convention).

(4) The limitations or restrictions must not only be legal but must always be "necessary in a democratic soceity" (articles 8 (2) and 11 (2) of the Convention and article 2 (3) of Protocol No. 4) for one of the reasons given in these articles; or they must be justified by the public interest (article 1 of the first Protocol and article 2 (4) of the Protocol No. 4).

(5) Limitations or restrictions may be justified by a number of reasons, including national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others.

(6) In the "Vagrancy Cases", the European Court of Human Rights invoked several of the above-mentioned reasons in deciding that the authorities "had sufficient reason to believe that it was "necessary" to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others".[90] In the Golder case, in concluding that there had been a violation of article 8, the Court recognized that "the prevention of disorder or crime" might justify wider interference with the rights of a convicted prisoner than with those of a person at liberty.[91]

(b) *Jurisprudence of the European Commission and the European Court of Human Rights relating to the limitations or restrictions provided for in articles 8 (2), 9 (2), 10 (2) and 11 (2) of the European Convention on Human Rights*

Protection of private and family life, the home and correspondence (European Convention, art. 8)

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[86] The World Health Organization publishes, quarterly in English and French, the *International Digest of Health Legislation*, a useful periodical which summarizes health laws in the countries of the world. In addition to summaries of current law, the *Digest* also prepares general comparative studies of selected subjects from time to time. For example, summaries have been prepared on laws concerning malaria control, air pollution, hospitalization of mental patients, tuberculosis control, and classification of pharmaceutical preparations. Articles on international health legislation may also be found in legal periodicals dealing with internatinal and comparative law, including *American Journal of International Law*, *American Journal of Comparative Law* and *The International and Comparative Law Quarterly*.

[87] Mention should be made in particular of three studies: "The hospitalization of mental patients", "Treatment of drug addicts" and "Abortion laws". See, respectively, *International Digest of Health Legislation* (Geneva), vol. 6, No. 1 (1955), pp. 3–100; *ibid.*, vol. 13, No. 1 (1962), pp. 3–46; and *ibid.*, vol. 21, No. 3 (1970), pp. 457–512.

[88] *International Health Regulations (1969)*, second annotated ed. (Geneva, WHO, 1974).

[89] United Nations, *Treaty Series*, vol. 213, p. 221.

[90] *European Court of Human Rights, De Wilde, Ooms and Versyp Cases ("Vagrancy" Cases), Judgment of 18th June 1971 (Publications of the European Court of Human Rights, Series A: Judgements and Decisions)*, p. 45.

[91] *European Court of Human Rights, Golder case, Judgment of 21 February 1975 (Publications of the European Court of Human Rights, Series A: Judgments and Decisions*, vol. 18), p. 21.

(7) Many written applications have been lodged against the Federal Republic of Germany in respect of convictions for homosexuality under article 175 of the Criminal Code of that country. The European Commission of Human Rights declared these applications inadmissible, since the exercise of this right may, in a democratic society, lead to interference in accordance with the law "for the protection of health or morals", within the meaning of article 8 (2). In its decisions, the Commission added that the Criminal Code of the Federal Republic of Germany was confined to supression of male homosexuality without violating the principle of non-discrimination between the sexes provided for in article 14 of the European Convention on Human Rights.

(8) In the case of an application against the Federal Republic of Germany in which the applicant, who had been granted a remission of sentence, complained that the court had rejected his request that his conviction should be expunged from the court records, and in which he also contested a judgement of the Federal Constitutional Court of Germany which had declared the Federal Shop Closing Times Act to be consistent with the Constitution, the Commission, on 4 October 1961, found that the application was manifestly ill-founded, since the keeping of court records relating to previous convictions was, in a modern society, necessary for the prevention of crime and in the interests of public safety in conformity with article 8 (2). It also held that the Federal Shop Closing Times Act was justified by considerations relating to "the economic well-being of the country" and by the need to regulate the use of property in conformity with the general interest.

(9) In the case of an application against the Netherlands, in which a United States citizen complained that, during his detention, the Netherlands authorities had intefered in his private life by refusing him permission to receive visits in prison, the Commission declared, on 13 December 1965, that, in so far as such restrictions had been imposed, they had been intended to prevent the applicant from using personal contacts for illegal purposes and were accordingly justified by article 8 (2) for "the prevention of crime".

(10) The European Commission of Human Rights has frequently expressed the view that measures such as expulsion, extradition and the refusal to grant an entry visa, in so far as they might constitute interference in the family life of the person concerned, were justified for "the prevention of disorder or crime", since they had been taken by the authorities after the conviction of the applicant for criminal offences.

(11) With regard to applications alleging interference with the right to respect for family life, relating to judicial decisions awarding the custody of children or defining the right of access after a divorce or separation, the Commission has declared that the award of custody to one of the parents inevitably constitutes interference in the family life of the other, but that the right of one parent to the custody of the children derives from a judicial decision and becomes one of the rights of others whose protection justifies, under article 8 (2), interference with the exercise of the right to respect for family life.

(12) The Commission has also expressed the view that the term "protection of health or morals" (article 8 (2)) covers not only the general protection of the health or morals of a community as a whole, but also the protection of individual members of the community; the Commission considered that the term "health or morals" denoted both the psychological and the physical well-being of individuals and, in the case in point, the protection of the child's mental equilibrium and protection from a serious psychological disorder.

(13) The Commission has declared that, in accordance with article 8 (2), the authorities may supervise a prisoner's correspondence in so far as is prescribed by law and that such action constitutes a measure which, in a democratic society, is necessary for the prevention of disorder or crime or for the protection of health or morals. In accordance with this principle, it declared to be manifestly ill-founded the application by a person suspected of having participated in drug trafficking, who had been detained in the Netherlands pending expulsion to the United States of America. The Commission noted that the authorities had considered it essential to be able to supervise the applicant's correspondence, in order to prevent violations of narcotics laws.

Freedom of thought, conscience and religion (European Convention, art. 9)

(14) The Commission held that the conviction of an applicant under the Austrian law prohibiting the German National Socialist Workers' (Nazi) Party necessarily imposed on him restrictions in the exercise of the freedoms protected by articles 9 and 10 of the Convention: in addition, since the applicant had been lawfully convicted for activities aimed at the reintroduction of Nazi activities in Austria, such restrictions were, in a democratic society, necessary to ensure public safety, national security and the protection of the rights and freedoms of others; consequently, the measures taken against the applicant were justified on the grounds of articles 9 (2) and 10 (2), respectively, of the Convention.

(15) In respect of an application in which the applicant complained that the prison authorities had interfered with the practice of his religion by forbidding him to grow a beard freely, as prescribed by that religion, the Commission declared that the need to be able to identify a prisoner might justify a measure constituting a restriction on freedom of religion within the meaning of article 9 (2) of the Convention.

(16) Article 4 of the Netherlands Act of 1952 relating to the prevention of tuberculosis in cattle, which makes it mandatory for cattle farmers to be affiliated with the health service, does not violate article 9 of the European Convention, as was alleged by an applicant. He maintained that article 4 of the above-mentioned Act placed him in a situation in which his religious conscience as a member of the Netherlands Reformed Church conflicted with the general obligations imposed on cattle farmers. The European Commission noted in this respect that the right to freedom of religion might be subject to restrictions which, in accordance with the law, constituted measures necessary in a democratic society for the protection of public health or morals. The Commission considered that the expression "protection of health" might reasonably apply to measures taken for the prevention of disease in cattle. It was in the interest of the community and, consequently, necessary in a modern society, that appropriate measures to that end, including affiliation with the health service, should be taken by the Government. There was therefore no violation of article 9 of the Convention and the application was accordingly declared inadmissible as being manifestly ill-founded.

Freedom of expression (European Convention, art. 10)

(17) In his application against Belgium, which was declared admissible on 9 June 1958, De Becker alleged that his conviction in 1946 for collaboration with the Nazi occupation forces had entailed the application of article 123 *sexies* of the Belgian Criminal Code, under which he had been deprived for life of many of his civic rights, including the right to freedom of expression. De Becker claimed that this constituted a violation of article 10 of the European Convention, and asked that he be granted the right to express his ideas by all legal means. In its report, the European Commission of Human Rights expressed the opinion that paragraphs (*e*), (*f*) and (*g*) of article 123 *sexies* of the Belgian Criminal Code, in so far as they affected freedom of expression, were not fully justified in the light of the European Convention, whether they were regarded as instituting criminal penalties or as preventive measures relating to public safety. They were not justified, in that the deprivation of freedom of expression for which they provided in other than political matters was imposed rigidly and for life, without regard to the possibility of mitigating that puinishment if, in time, national morale and public order were restored and the maintenance in force of that particular disability ceased to be a measure "necessary in a democratic society" within the meaning of article 10 (2) of the Convention.

(18) The Commission has frequently concluded that, in cases in which it is established that a public authority has interfered with the exercise of the rights and freedoms guaranteed by the European Convention, it has not only the right but also the duty to examine the question whether such interference, be it legislative or otherwise, is consistent with the terms of the relevant provisions of the Convention. It has also expressed the opinion after studying this question, both in a general context and with particular reference to article 10 (2) of the Convention, that a State has a certain margin of appreciation in fixing the limits which may be imposed on freedom of expression.

(19) The Commission held that articles 4, 6 and 21 of the Act on the dissemination of publications liable to corrupt young people, promulgated by the Federal Republic of Germany on 9 July 1953, in no way exceeded a certain margin of appreciation or constituted restrictions on freedom of expression as authorized under article 10 (2) of the Convention, since, first, they were prescribed by a law and, secondly, they constituted measures necessary for the protection of the morals of young people.

(20) In addition to the restrictions expressly stipulated in articles 8

and 11 of the Convention, the Commission has, over the years, developed the idea that there are certain inherent limitations or restrictions on the rights of persons lawfully detained in accordance with article 5 of the Convention. Thus, in examining the complaints of prisoners, the Commission has for several years endorsed the view that many of the restrictions alleged by prisoners in fact represented an inherent characteristic of detention and did not need to be justified in one of the exceptions expressly stipulated in the Convention.

(21) In the De Courcy case, the Commission declared that the restriction of a prisoner's right to correspondence was a necessary aspect of deprivation of freedom entailed by imprisonment.

(22) In its report on the Golder case, adopted on 1 June 1973, the European Commission of Human Rights gave fairly detailed consideration to the question whether article 6 of the Convention contained inherent limits in this case, but did not deem it necessary to examine the question from the standpoint of article 8 of the Convention. In its decision of 21 February 1975, the Court held that the right of access to the courts, guaranteed by article 6 (1), was not absolute. It considered that, in the case of a right which the Convention recognized (cf. articles 13, 14, 16 and 25) without defining it in a narrow sense, there was room, outside the limits which circumscribe the actual substance of any right, for implicitly accepted limitations. The Court ruled that it bore no responsibility for drafting a general theory of admissible limitations in the case of prisoners and confined itself to stating the facts, a course from which it may be inferred that, on the basis of those facts, the Convention authorized no legitimate limitation or restriction.

Freedom of movement (article 2 of Protocol No. 4 to the European Convention)

(23) In this context, note should be taken of the restrictions embodied in article 2 of Protocol No. 4 to the European Convention.[92] This article reads as follows:

> "1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> "2. Everyone shall be free to leave any country, including his own.
>
> "3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> "4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

(24) In an application against the Federal Republic of Germany, which was declared inadmissible on 26 May 1970, the applicant, an Algerian, claimed that he had been threatened with expulsion from the Federal Republic of Germany under an expulsion order issued against him because of his previous convictions for criminal activities. The applicant, invoking article 3 of Protocol No. 4 to the European Convention, alleged that his expulsion to Algeria would endanger his life because of his previous political activities; he also alleged that the German authorities' refusal to allow him to leave freely and by his own means the territory of the Federal Republic of Germany constituted a violation of article 2 of the said Protocol. The European Commission of Human Rights held that a person in respect of whom an expulsion order had been issued and who had been detained with a view to the execution of that order could not invoke the right "to leave any country, including his own" in accordance with article 2, paragraph 2, of the aforementioned Protocol. In fact, the restrictions imposed on the applicant's freedom of movement which prevented him from freely leaving the country which had issued the expulsion order against him were among those referred to in paragraph 3 of that article. Consequently, the complaint invoking article 2 of Protocol No. 4 to the Convention was manifestly ill-founded.

(25) Several cases which were also declared inadmissible concerned applicants who had been detained either in prison in order to serve a sentence or in rehabilitation centres, and who complained that they could not freely leave the territory of the country in which they were detained. In all these cases, the Commission considered that the restriction imposed on their freedom of movement was prescribed by law and was necessary, in a democratic society, for the maintenance of public order. In this respect, the Commission referred to the preparatory work for Protocol No. 4, from which it emerged that its authors had indeed intended that the restrictions imposed as part of a penalty applied for a crime should be covered by the concept of the maintenance of public order.

(c) *General restrictions*

(26) Article 17 of the European Convention on Human Rights reads as follows:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

(27) In the opinion of the European Commission of Human Rights, the purpose of this fundamental provision is to safeguard the rights enumerated in the Convention, through the protection of the free functioning of democratic institutions.

(28) In the Lawless case,[93] the Irish Government maintained that the Irish Republican Army (IRA) activities in which Lawless was involved were covered by article 17 of the Convention and that, consequently, the applicant no longer had the right to invoke articles 5, 6 and 7 or any other article of the Convention. The Commission expressed the view that article 17 of the Convention did not apply in the case in question, and declared that the general purpose of article 17 was to prevent totalitarian groups from exploiting for their benefit the principles established by the Convention but, in order that that purpose might be attained, individuals must not be deprived of all the rights and freedoms guaranteed by the Convention. Article 17 essentially covers those rights which, if invoked, might give rise to attempts to derive therefrom the right effectively to engage in the activities referred to in this article. The European Court of Human Rights followed in substance the view of the Commission, using slightly different language. Thus, article 17 only applies to rights which, like those embodied in articles 9, 10 and 11 of the Convention, permit an individual to engage in activities but not to invoke those articles in order to engage in subversive activities. An individual involved in subversive activities may not, therefore, be deprived of the right to a fair trial, which is recognized in article 6 of the convention; on the other hand, he may not take advantage of the freedom to organize political meetings, for example, if his objective is to use this freedom to undermine all civil liberties. The problem continues to lie in the purpose for which rights are exercised, the principle being that no one should be able to invoke the provisions of the Convention in order to engage in acts aimed at the destruction of rights and freedoms.

(29) Article 17 of the Convention may therefore not be invoked in order to deprive an individual of his political freedom simply because he has in the past supported a totalitarian government.[94]

Abuse of restrictions (European Convention, art. 18)

(30) Article 18 of the Convention reads:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

(31) In the *Kamma* v. *Netherlands* case,[95] the applicant complained that, while he had been held in custody pending trial, the police had taken advantage of his detention in order to carry out investigations linking him with a homicide case, although he had not been detained on that charge and a judicial inquiry had not been authorized. He therefore claimed a violation of article 18 of the European Convention, combined with article 5 of the Convention.

(32) The Government of the Netherlands answered that it was normal procedure, and in no way contrary to the Convention, to

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[92] For the text of the Protocol, see *Yearbook of the European Convention on Human Rights, 1963*, p. 14.

[93] *European Court of Human Rights, "Lawless" Case (Merits), Judgment of 1st July 1961 (Publications of the European Court of Human Rights, Series A: Judgments and Decisions, 1960—61).*

[94] *European Court of Human Rights, "De Becker" Case (Publications of the European Court of Human Rights, Series B: Pleadings, Oral Arguments and Documents, 1962)*, pp. 137–138.

[95] See *Yearbook of the European Convention on Human Rights, 1972*, p. 414.

carry out police investigations with a view to bringing criminal charges before they had been authorized by a judical decision. That argument was declared admissible by the European Commission of Human Rights, which, in its report adopted on 14 July 1974, concluded that there had not been a violation of article 18 combined with article 5 of the Convention.

F. Review of constitutional and other provisions in selected States Members of the United Nations relating to limitations on the exercise of certain human rights and fundamental freedoms

99. In order to present a more complete comparative study of the constitutional, legislative and regulatory provisions relating to limitations or restrictions on the exercise of certain human rights and fundamental freedoms, and to draw conclusions on which recommendations should be based, the Special Rapporteur will take into consideration not only the replies submitted by Governments, specialized agencies and regional organizations, reproduced in sections C, D and E above, but also relevant provisions of the legal systems of the following States listed below.

CANADA

100. On 10 August 1960, the Canadian Bill of Rights became law. The question of the promotion and protection of civil liberties in Canada is bound up with the issue of federal-provincial jurisdiction and the meaning and applicability of parliamentary sovereignty.

101. In this connection, the preamble to the Canadian Bill of Rights[96] contains the following paragraphs:

> Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;
>
> And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada;

102. The following are among the most important of the provisions of the Canadian Bill of Rights relating to limitations or restrictions on the powers of the State and on individual rights and freedoms:

> *Part I*
>
> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> . . .
>
> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> (*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;
>
> (*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;
>
> (*c*) deprive a person who has been arrested or detained
>
> (i) of the right to be informed promptly of the reason for his arrest or detention,
>
> (ii) of the right to retain and instruct counsel without delay, or
>
> (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
>
> (*d*) authorize a court, tribunal, commission, board or any other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;
>
> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
>
> (*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
>
> (*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

INDIA

103. The fundamental rights of the individual are guaranteed by the provisions of part III of the Constitution of India of 26 November 1949, as amended on 5 October 1963.[97]

104. In the matter of jurisdiction, the Constitution has created in some of the fundamental rights a permissible zone within the bounds of which the State alone may interfere. Beyond these limits, the rights are absolutely and permanently free of State control. The Indian courts have strictly interpreted the limits of this scope by the application of "the rule of exclusive legislation", which requires every such law to confine itself to one or more of the permissible subjects specified against each of these rights. The Constitution itself has made a primary adjustment in these rights between freedom and social control and has permanently fixed the maximum scope of the legislative power. Thus, with respect to fundamental rights, apart from limiting the legislative power within the permissible sphere, the Constitution further requires all restrictions to be reasonable, which renders the issue justiciable in the courts of law. The courts, however, have made a sharp distinction between substantive reasonableness and procedural reasonableness. It is only in the former that the courts may question the plenary nature of the legislative power. Accordingly, under the Indian Constitution, the courts cannot question the reasonableness of the object of the legislation; they must accept without examination the legislative determination as to the requirement of the restrictions. What is open to them for substantive consideration is only the extent of the restrictions, and there, too, the courts start with the presumption that every restriction is reasonable unless proved otherwise by the opposing party. All other considerations in this connection relate to procedural reasonableness, and there the courts have ruled that all such laws, except emergency legislation, must themselves provide for the observance of the rules of natural justice.

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[96] A. J. Peaslee, *Constitutions of Nations*, revised 3rd ed. (The Hague, Martinus Nijhoff), vol. IV (1970), pp. 237–239.

[97] Peaslee, *op, cit.*, vol. II (1966), pp. 308–438. See also J. L. Kapur, "The Constitution of India and some recent amendments made therein", in *Jahrbuch des Öffentlichen Rechts der Gegenwart* (Tübingen, Mohr, 1974), New Series, vol. 23, pp. 505–536.

105. According to the Supreme Court of India, the principle of legislative supremacy was the basic principle of the Indian Constitution.[98]

106. The following are the most important provisions of part III of the Constitution of India relating to fundamental rights and their restriction:

RIGHT TO EQUALITY

Article 14

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15

1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

2. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction, or condition with regard to:

(*a*) access to shops, public restaurants, hotels and places of public entertainment; or

(*b*) the use of wells, tanks, bathing *ghats*, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

3. Nothing in this article shall prevent the State from making any special provision for women and children.

4. Nothing in this article or in clause 2 of article 29[99] shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

Article 16

1. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

2. No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

3. Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

4. Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

5. Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

RIGHT TO FREEDOM

Article 19

1. All citizens shall have the right:

(*a*) to freedom of speech and expression;

(*b*) to assemble peaceably and without arms;

(*c*) to form associations or unions;

(*d*) to move freely throughout the territory of India;

(*e*) to reside and settle in any part of the territory of India;

(*f*) to acquire, hold and dispose of property; and

(*g*) to practice any profession, or to carry on any occupation, trade or business.

2. Nothing in sub-clause (*a*) of clause 1 shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

3. Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of the sovereignty and integrity of India, or of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

4. Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India, or of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

5. Nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

6. Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Article 20

1. No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

2. No person shall be prosecuted and punished for the same offence more than once.

3. No person accused of any offence shall be compelled to be a witness against himself.

Article 21

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 22

1. No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

2. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

3. Nothing in clauses 1 and 2 shall apply:

(*a*) to any person who for the time being is an enemy alien; or

(*b*) to any person who is arrested or detained under any law providing for preventive detention.

4. No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless:

(*a*) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention.

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[98] See *A. K. Gopalan* v. *State of Madras*, 1950, Supreme Court Report 88, *The Yearly Digest of Indian and Select English Cases* (Mylapore, Madras Law Journal Office, 1950), p. 1233. Also H.M. Seervai, *The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism* (Bombay, N. M. Tripathi, 1978), pp. 30–31.

[99] Reproduced below.

Provided that nothing in the sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (*b*) of clause 7; or

(*b*) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (*a*) and (*b*) of clause 7.

5. When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

6. Nothing in clause 5 shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

7. Parliament may by law prescribe:

(*a*) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (*a*) of clause 4;

(*b*) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(*c*) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (*a*) of clause 4.

RIGHT AGAINST EXPLOITATION

Article 23

1. Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

2. Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

RIGHT TO FREEDOM OF RELIGION

Article 25

1. Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

2. Nothing in this article shall affect the operation of any existing law or prevent the State from making any law:

(*a*) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(*b*) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

. . .

Article 26

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right:

(*a*) to establish and maintain institutions for religious and charitable purposes;

(*b*) to manage its own affairs in matters of religion;

(*c*) to own and acquire movable and immovable property; and

(*d*) to administer such property in accordance with law.

CULTURAL AND EDUCATIONAL RIGHTS

Article 29

1. Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

2. No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30

1. All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

2. The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

RIGHT TO PROPERTY

Article 31

1. No person shall be deprived of his property save by authority of law.

2. No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

. . .

5. Nothing in clause 2 shall affect:

(*a*) the provisions of any existing law other than a law to which the provisions of clause 6 apply, or

(*b*) the provisions of any law which the State may hereafter make:

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

. . .

KENYA

107. The Constitution of Kenya[100] of December 1963, as revised in 1965 and further amended in 1967, guarantees individual rights, and freedoms, among which are included the right to life and personal liberty, to protection from slavery and forced labour, inhuman treatment and deprivation of property, to the sanctity of the domicile and the protection of the law, and to freedom of conscience, of expression, of assembly and association, and of movement. Discrimination is forbidden.

108. The Constitution provides further that certain of these fundamental rights and freedoms are subject to lawful limitations or restrictions.

109. Thus, section 70 states:

> Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely
>
> (*a*) life, liberty, security of the person and the protection of the law;
>
> (*b*) freedom of conscience, of expression and of assembly and association; and,
>
> (*c*) protection for the privacy of his home and other property and from deprivation of property without compensation,
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said

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[100] Peaslee, *op. cit.*, revised 4th ed., vol. I (1974), pp. 335–412.

rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

110. Section 72, paragraph 1, provides, *inter alia*:

No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say:

(*a*) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;

(*b*) in execution of the order of the High Court or any Court of Appeal exercising jurisdiction in Kenya punishing him for contempt of any such court or of another court or tribunal;

(*c*) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;

. . .

(*f*) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

(*g*) for the purpose of preventing the spread of an infectious or contagious disease;

(*h*) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(*i*) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradiction or removal as a convicted prisoner from one country to another;

. . .

111. Section 75 provides that:

1. No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say:

(*a*) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(*b*) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(*c*) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

2. Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for:

(*a*) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled;

. . .

6. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection 1 or subsection 2 of this section:

(*a*) to the extent that the law in question makes provision for the taking of possession or acquisition of any property:

(i) in satisfaction of any tax, duty, rate, cess or other impost;

(ii) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya;

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

(iv) in the execution of judgements or orders of a court in proceedings for the determination of civil rights or obligations;

(v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;

(vi) in consequence of any law with respect to the limitation of actions; or

(vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out),

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or

(*b*) to the extent that the law in question makes provision for the taking of possession or acquisition of;

(i) enemy property;

. . .

112. Section 76 contains the following provisions:

1. Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:

(*a*) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit;

(*b*) that is reasonably required for the purpose of promoting the rights or freedoms of other persons.

(*c*) that authorizes an officer or agent of the Government of Kenya, or of the East African Community, or of a local government authority, or of a body corporate established by law for public purposes, to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, Community, authority or body corporate, as the case may be; or

(*d*) that authorizes, for the purpose of enforcing the judgement or order of a court in any civil proceedings, the entry upon any premises by order of a court, and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

113. Section 77 contains the following provisions:

10. Except with the agreement of all parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

11. Nothing in subsection 10 of this section shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority:

(*a*) may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or

(*b*) may by law be empowered or required to do in the interests of defence, public safety or public order.

114. Section 78 contains the following provisions:

1. Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

. . .

5. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required:

(*a*) in the interests of defence, public safety, public order, public morality or public health; or

(*b*) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

6. References in this section to a religion shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly.

115. Section 79 contains the following provisions:

1. Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from intereference with his correspondence.

2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:

(*a*) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(*b*) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(*c*) that imposes restrictions upon public officers or upon persons in the service of the East African Community or of a local government authority,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

116. Section 80 contains the following provisions:

1. Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:

(*a*) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(*b*) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

(*c*) that imposes restriction upon public officers, members of a disciplined force, or persons in the service of the East African Community or of a local government authority; or

(*d*) for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration, and conditions whereby registration may be refused on the grounds that any other trade union already registered or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought),

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

117. Section 81 provides that:

1. No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.

2. Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

3. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:

(*a*) for the imposition of restrictions on the movement or residence within Kenya of any person or on any person's right to leave Kenya that are reasonably required in the interests of defence, public safety or public order;

(*b*) for the imposition of restrictions on the movement or residence within Kenya or on the right to leave Kenya of persons generally or any class of persons that are reasonably required in the interests of defence, public safety, public order, public morality, public health or the protection or control of nomadic peoples and except so far as the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;

(*c*) for the imposition of restrictions, by order of a court, on the movement or residence within Kenya of any person or any person's right to leave Kenya either in consequence of his having been found guilty of a criminal offence under the law of Kenya or for the purpose of ensuring that he appears before a court at a later date for trial of such criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from Kenya;

(*d*) for the imposition of restrictions on the acquisition or use by any person of land or other property in Kenya;

(*e*) for the imposition of restrictions upon the movement or residence within Kenya or on the right to leave Kenya of public officers or of members of a disciplined force;

(*f*) for the removal of a person from Kenya to be tried or punished in some other country for a criminal offence under the law of that other country or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted; or

(*g*) for the imposition of restrictions on the right of any person to leave Kenya that are reasonably required in order to secure the fulfilment of any obligations imposed on that person by law and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society.

4. If any person whose freedom of movement has been restricted by virtue of such a provision as is referred to in subsection (3) (*a*) of this section so requests at any time during the period of that restriction not earlier than three months after the order was made or three months after he last made such request, as the case may be, his case shall be reviewed by an independent and impartial tribunal presided over by a person appointed by the President from among persons qualified to be appointed as a judge of the High Court.

5. On any review by a tribunal in pursuance of subsection (4) of this section of the case of any person whose freedom of movement has been restricted, the tribunal may make recommendations concerning the necessity or expediency of continuing that restriction to the authority by whom it was ordered and, unless it is otherwise provided by law, that authority shall be obliged to act in accordance with any such recommendations.

6. Until it is otherwise provided by Act of Parliament nothing in this section shall affect the operation of the Outlying Districts Act or the Special Districts (Administration) Act or any law amending or replacing either of those Acts:

> "Provided that no law amending or replacing either of those Acts shall impose, or authorize the imposition of, restrictions on the rights guaranteed by this section greater than the restrictions on those rights in force under that Act on 31st May 1963, and no such restriction shall be imposed under either of those Acts, or by or under any such law as aforesaid, in or in respect of any area other than an area in or in respect of which a restriction was in force under that Act on 31st May 1963."

118. Section 82 contains the following provisions:

1. Subject to subsections 4, 5 and 8 of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

2. Subject to subsections 6, 8 and 9 of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

3. In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

119. The following definitions and provisions are

contained in section 86:

1. In this chapter, except where the context otherwise requires:

"contravention", in relation to any requirement, includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;

"court" means any court having jurisdiction in Kenya other than a court established by disciplinary law, but includes, in sections 71 and 73 of this Constitution, a court established by disciplinary law;

"disciplinary law" means a law regulating the discipline of any disciplined force;

"disciplined force" means:

(*a*) any of the armed forces;

(*b*) a police force;

(*c*) a prison service; or

(*d*) the National Youth Service;

"legal representative" means a person entitled to practise as an advocate in Kenya; and

"member" in relation to a disciplined force, includes any person who, under the law regulating the discipline of that force, is subject to that discipline.

2. In relation to any person who is a member of a disciplined force raised under any law in force in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this chapter other than sections 71, 73 and 74.

3. In relation to any person who is a member of a disciplined force raised otherwise than as aforesaid and lawfully present in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter.

PORTUGAL

120. The Constitution of Portugal, which entered into force on 25 April 1976,[101] contains the following basic provisions relating in particular to limitations or restrictions on the exercise of certain rights.

Article 13 (Principle of equality)

1. All citizens shall have the same social dignity and shall be equal before the law.

2. No one shall be privileged, favoured, injured, deprived of any right or exempt from any duty because of his ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation or social condition.

Article 18 (Legal force)

1. The constitutional provisions relating to rights, freedoms and safeguards shall be directly applicable and binding on public and private bodies.

2. Rights, freedoms and safeguards may be restricted by law in only those cases expressly provided for in the Constitution.

3. Laws restricting rights, freedoms and safeguards shall be general and abstract in character and shall not limit in extent and scope the essential content of constitutional provisions.

Article 27 (Right to freedom and security)

1. Everyone shall have the right to freedom and security.

2. No one shall be deprived of his freedom except as a result of a court judgement convicting him of an offence punishable by law by a prison sentence or as a result of judicial application of a security measure.

3. An exception to this principle shall be deprivation of freedom in the following cases for a period and on conditions to be laid down by law:

(*a*) Remand in custody, where a person is taken *in flagrante delicto* or where there is strong evidence that he has committed a deliberate offence punishable by a major sentence;

(*b*) The arrest or detention of a person who has unlawfully entered the national territory or against whom extradition or deportation proceedings have been instituted.

4. Everyone deprived of his freedom shall be informed without delay of the reasons for his arrest or detention.

Article 30 (Limits on sentences and security measures)

1. No one shall be subjected to a sentence or security measure involving imprisonment for life or for an unlimited or indefinite term.

2. In the case of danger due to grave mental disorder that cannot be treated in an open environment, security measures involving deprivation of freedom may be extended, successively by judicial decision in each case, for as long as the said condition lasts.

3. Sentences shall not be transferable.

4. No one shall be deprived for political reason of his Portuguese citizenship, his civil capacity or his name.

Article 32 (Safeguards in criminal proceedings)

1. Criminal proceedings shall provide all necessary safeguards for the defence.

2. Everyone charged with an offence shall be presumed innocent until his conviction has acquired the force of *res judicata*.

3. The accused shall have the right to be assisted by counsel at all stages of the proceedings. The cases and stages in which this shall be compulsory shall be specified by law.

4. A judge shall have jurisdiction throughout the preliminary investigation, and the cases in which this shall involve the hearing of both parties shall be specified by law.

5. Criminal proceedings shall be accusatory in structure, and the trial shall be governed by the principle that both parties are to be heard.

6. Any evidence obtained by torture, force, violation of the physical or moral integrity of the individual, wrongful interference in private life, the home, correspondence or telecommunications shall be of no effect.

7. No case shall be withheld from a court which has jurisdiction under existing law.

Article 34 (Inviolability of home and correspondence)

1. The individual's home and the privacy of his correspondence and other means of private communication shall be inviolable.

2. A citizen's home shall not be entered against his will except by order of the competent judicial authority and in the cases and according to the forms laid down by law.

3. No one shall enter the home of any person at night without his consent.

4. Any interference by public authority with correspondence or telecommunications, apart from the cases laid down by law in connexion with criminal procedure, shall be prohibited.

Article 35 (Use of data processing)

1. All citizens shall have the right to information on the contents of data banks concerning them and on the use for which it is intended. They shall be entitled to require the said contents to be corrected and brought up to date.

2. Data processing shall not be used for information concerning a person's political convictions, religious beliefs or private life except in the case of non-identifiable data for statistical purposes.

3. Citizens shall not be given all-purpose national identification numbers.

Article 37 (Freedom of expression and information)

1. Everyone shall have the right to express and make known his thoughts freely by words, images or any others means and obtain information without hindrance or discrimination.

2. The exercise of these rights shall not be prevented or restricted by any type or form of censorship.

3. Offences committed in the exercise of these rights shall be punishable under ordinary law, the courts of law having jurisdiction to try them.

4. The right of reply shall be equally and effectively secured to all natural and artificial persons.

Article 38 (Freedom of the press)

1. Freedom of the press shall be safeguarded.

2. Freedom of the press shall involve freedom of expression and creation for journalists and literary contributors and a place for the former in giving ideological orientation to information organs not belonging to the State or to political parties, without any other sector or group of workers having power to exercise censorship or prevent free creativity.

3. Freedom of the press shall involve the right to found newspapers and any other publications without prior administrative authority, deposit or qualification.

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[101] See: Portugal, Office of the Secretary of State for Mass Communication, *Constitution of the Portuguese Republic* (Lisbon, January 1977). See also part one above, paras. 88 and 89.

4. Periodicals and non-periodical publications may belong to any non-profit-making bodies corporate, journalistic enterprises and publishing houses in company form or natural persons of Portuguese nationality.

5. No administrative or fiscal system, credit policy or foreign trade policy shall affect the freedom of the press, directly or indirectly, and the means necessary to protect the independence of the press against political and economic powers shall be safeguarded by law.

6. The television shall not be privately owned.

7. Means of public information, in particular those belonging to the State, shall be regulated by law through an information statute.

Article 41 (Freedom of conscience, religion and worship)

. . .

5. The right of conscientious objection shall be recognized, provided that conscientious objectors shall be required to perform unarmed service for a period identical with that of compulsory military service.

Article 42 (Freedom of cultural creation)

1. Intellectual, artistic and scientific creation shall be unrestricted.

2. This freedom shall include the right to invention, production and dissemination of scientific, literary or artistic works, including legal protection of copyright.

Article 46 (Freedom of association)

1. Citizens shall have the right to form associations freely and without requiring any authorization provided such associations are not intended to promote violence and their objectives are not contrary to the criminal law.

2. Associations may pursue their objectives freely without interference by any public authority. They shall not be dissolved by the State and their activities shall not be suspended except by judicial decision in the cases provided by law.

3. No one shall be obliged to join any association or forced by any means to remain in it.

4. Armed, military-type, militarized or para military associations outside the State and the Armed Forces and organizations which adopt Fascist ideology shall not be permitted.

Article 51 (Right to work)

1. Everyone shall have the right to work.

2. The duty to work is inseparable from the right to work, except for those persons whose capacities have been diminished by age, sickness or disability.

3. Everyone shall have the right to choose his occupation or type of work freely, subject to such restrictions as are imposed by law in the general interest or are inherent in his own capacity.

Article 59 (Right to strike)

1. The right to strike shall be safeguarded.

2. Workers shall be entitled to decide what interests are to be protected by means of strikes. The sphere of such interests shall not be restricted by law.

Article 62 (Right to private property)

1. Everyone shall have a secure right to private property and to its transfer during life or by death in accordance with the Constitution.

2. Apart from the cases provided for in the Constitution, expropriation for public purposes shall be subject to the payment of fair compensation.

SPAIN

121. The Constitution of Spain,[102] under title I, "On Basic Rights and Duties", contains the following basic provisions relating to limitations and restrictions on the exercise of certain human rights:

Article 10. 1. The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of the political order and the social peace.

2. The norms relative to basic rights and liberties which are recognized by the Constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.

Article 14. Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.

Article 15. All have the right to life and physical and moral integrity and in no case may they be subjected to torture or inhuman or degrading punishment or treatment. The death penalty is abolished except in those cases which may be established by military penal law in times of war.

Article 16. 1. Freedom of ideology, religion and cult of individuals and communities is guaranteed without any limitation in their demonstrations other than that which is necessary for the maintenance of public order protected by law.

. . .

Article 17. 1. Every person has the right to liberty and security. No one may be deprived of his liberty without observance of the provisions of this article and only in the cases and in the form prescribed by law.

2. Preventive arrest may not last more than the time strictly necessary for the investigations which tend to clarify events, and in every case, within a maximum period of 72 hours, the person detained must be freed or placed at the disposal of the judicial authority.

3. Every person arrested must be informed immediately, and in a way that is understandable to him, about his rights and the reasons for his arrest, and he may not be forced to make a statement. The assistance of an attorney to the arrested is guaranteed during police and judicial proceedings under the terms established by law.

4. The law will regulate a process of "habeas corpus" so that any person who is illegally arrested may be immediately placed at the disposal of the judiciary. The maximum period of provisional imprisonment shall also be determined by law.

Article 18. 1. The right of honour, personal and family privacy and identity is guaranteed.

2. The home is inviolable. No entry or search may be made without legal authority except with the express consent of the owners or in the case of a flagrant crime.

3. Secrecy of communications, particularly postal, telegraphic and telephone communications, is guaranteed, except by judicial order.

4. The law shall limit the use of information, to guarantee personal and family honour, the privacy of citizens and the full exercise of their rights.

Article 19. Spaniards have the right to freely select their residence and to travel in the national territory.

They also have the right to enter and leave Spain freely under the conditions established by law. That right cannot be restricted because of political or ideological motives.

Article 20. 1. The following rights are recognized and protected:

(*a*) To express and disseminate thoughts freely through words, writing or any other means of reproduction;

(*b*) Literary, artistic, scientific and technical production, and creation;

(*c*) Academic freedom;

(*d*) To communicate or receive freely truthful information through any means of dissemination. The law shall regulate the right to the protection of the clause on conscience and professional secrecy in the exercise of these freedoms.

2. The exercise of these rights cannot be restricted through any type of prior censorship.

3. The law shall regulate the organization and parliamentary control of the means of social communication owned by the State or any public entity and shall guarantee access to those means by significant social and political groups, respecting the pluralism of society and the various languages of Spain.

4. These liberties have their limits in the respect for the rights recognized in this Title, in the precepts of the laws which develop it and, especially, in the right to honour, privacy, personal identity and protection of youth and childhood.

5. The seizure of publications, recordings or other means of information may only be determined by a judicial resolution.

Article 21. 1. The right to peaceful, unarmed assembly is recognized. The exercise of this right does not require prior authorization.

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[102] A. P. Blaustein and G. H. Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y., Oceana Publications), vol. XIII, Spain (issued October 1979). For the original text, see J. de Esteban, *Constituciones Españolas y Extranjeras*, 2nd ed. (Madrid, Taurus, 1979), t. I, pp. 416 ff. See also part one above, paras, 91–93.

2. In the cases of meetings in places of public transit and of manifestations, prior notification shall be given to the authorities, which can only forbid them when there are reasons based on disturbances of public order with danger for persons or property.

Article 22. 1. The right of association is recognized.

2. Associations which pursue purposes or use methods which are classified as crimes, are illegal.

3. Associations constituted under the provisions of this article must register for purposes of public information only.

4. Associations may only be dissolved or their activities suspended by virtue of a motivated judicial order.

5. Secret and paramilitary associations are prohibited.

Article 23. 1. Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage.

2. They also have the right to accede, under conditions of equality to public functions and positions, in accordance with the requirements established by law.

Article 28. 1. All have the right to unionize freely. The law may limit or except from the exercise of this right the Armed Forces or Military Institutes, or the other Corps subject to military discipline and shall regulate the peculiarities of its exercise for political functionaries. Syndical liberty includes the right to found unions and to join the union of one's choice, as well as the right of the unions to form confederations, to found international union organizations or to join them. No one may be forced to join a union.

2. The right of workers to strike in defence of their interests is recognized. The law which regulates the exercise of this right shall establish precise guarantees to insure the maintenance of essential services of the community.

Article 29. 1. All Spaniards shall have the right to personal and collective petition, in writing, in the form and with the effects the law shall determine.

2. Members of the Armed Forces, Institutes, or the Corps subject to military discipline, may exercise this right only individually and in accordance with the provisions of their specific legislation.

Article 33. 1. The right to private property and inheritance is recognized.

2. The social function of these rights shall determine the limits of their content in accordance with the law.

3. No one may be deprived of this property and rights except for justified cause of public utility or social interest after proper indemnification in accordance with the provisions of law.

Article 34. 1. The right of foundation for purposes of general interest is recognized in accordance with the law.

2. The provisions of paragraphs 2 and 4 of Article 22 shall also be applicable to foundations.

Articles 36. The law shall regulate the peculiarities of the juridical governance of the Professional Colleges and the exercise of professions requiring academic degrees. The internal structure and functioning of the Colleges must be democratic.

Article 37. 1. The law shall guarantee the right to collective labour negotiations between the representatives of workers and employers, as well as the binding force of agreements.

2. The right of the workers and employers to adopt measures concerning collective conflict is recognized. The law which shall regulate the exercise of this right, without prejudice to the limitations it may establish, shall include precise guarantees to insure the functioning of the essential services of the community.

Article 38. Free enterprise within the framework of a market economy is recognized. The public authorities guarantee and protect its exercise and the defence of productivity in accordance with the exigencies of the general economy, and as the case may be, in keeping with planning.

Article 43. 1. The right to health protection is recognized.

2. It is incumbent upon the public authorities to organize and watch over public health and hygiene through preventive measures and through necessary care and services. The law shall establish the rights and duties of all in this respect.

Article 52. The law shall regulate the professional organizations which contribute to the defence of their own economic interests. Their internal structure and functioning must be democratic.

Article 53. 1. The rights and liberties recognized in the second chapter of the present Title are binding on all public authorities. Only by law, which in every case must respect their essential content, could the exercise of such rights and liberties be regulated, and they shall be protected in accordance with the provisions of Article 161, 1(*a*).[103]

Article 55. . . .

2. An organic law may determine the manner and the cases in which, in an individual manner and with the necessary judicial intervention and adequate parliamentary control, the rights recognized in Article 17, paragraph 2, and Article 18, paragraphs 2 and 3, may be suspended for certain persons with respect to investigations having to do with the activities of armed bands or terrorist elements.

SRI LANKA

122. The Constitution of the Democratic Socialist Republic of Sri Lanka[104] ensures, in chapter III, the fundamental rights of the individual, which have thus been made justiciable. The citizen is not merely protected against possible legislative discrimination but is also provided with remedies against an imminent infringement of his rights by executive or administrative action.[105]

123. These fundamental rights are subject only to such restrictions as may be prescribed by law in the interest of national security.

124. The following are the basic provisions relating to fundamental rights and to the restrictions to which certain of them are subject.

Chapter III. Fundamental rights

[Art.] 10. Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

[Art.] 11. No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[Art.] 12. 1. All persons are equal before the law and entitled to the equal protection of the law.

2. No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds:

Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the Public, Judicial or Local Government Service or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office;

Provided further that it shall be lawful to require a person to have a sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.

3. No person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

4. Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

[Art.] 13. 1. No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

2. Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal

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[103] Article 161, 1 (*a*) of the Constitution of Spain relates to unconstitutionality appeals against laws and regulations having the force of law.

[104] The Constitution of the Democratic Socialist Republic of Sri Lanka, which repealed the earlier Constitution of 1972, came into force in 1978. The text was published by the Department of Government Printing, Sri Lanka, in 1978.

[105] See the comments of the Government of Sri Lanka relating to the individual's duties to the community, reproduced in part one above. para. 64, which were based mainly on the Prevention of Social Disabilities Act, No. 21 of 1957.

liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

3. Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

4. No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

5. Every person shall be presumed innocent until he is proved guilty:

"Provided that the burden of proving particular facts may, by law, be placed on an accused person."

6. No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.

7. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, or such other law as may be enacted in substitution therefor, shall not be a contravention of this Article.

[Art.] 14. 1. Every citizen is entitled to—

(*a*) the freedom of speech and expression including publication;

(*b*) the freedom of peaceful assembly;

(*c*) the freedom of association;

(*d*) the freedom to form and join a trade union;

(*e*) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching;

(*f*) the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language;

(*g*) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;

(*h*) the freedom of movement and of choosing his residence within Sri Lanka; and

(*i*) the freedom to return to Sri Lanka.

2. A person who, not being a citizen of any other country, has been permanently and legally resident in Sri Lanka immediately prior to the commencement of the Constitution and continues to be so resident shall be entitled, for a period of ten years from the commencement of the Constitution, to the rights declared and recognized by paragraph (1) of this Article.

[Art.] 15. 1. The exercise and operation of the fundamental rights declared and recognized by Articles 13.5 and 13.6 shall be subject only to such restrictions as may be prescribed by law in the interests of national security. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

2. The exercise and operation of the fundamental right declared and recognized by Article 14.1 (*a*) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

3. The exercise and operation of the fundamental right declared and recognized by Article 14.1 (*b*) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony.

4. The exercise and operation of the fundamental right declared and recognized by Article 14.1 (*c*) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or national economy.

5. The exercise and operation of the fundamental right declared and recognized by article 14.1 (*g*) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to:

(*a*) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental right, and

(*b*) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.

6. The exercise and operation of the fundamental right declared and recognized by Article 14.1 (*h*) shall be subject to such restrictions as may be prescribed by law in the interests of national economy.

7. The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13.1, 13.2 and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

8. The exercise and operation of the fundamental rights declared and recognized by Articles 12.1, 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

[Art.] 16. 1. All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.

2. The subjection of any person on the order of a competent court to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter.

. . .

Chapter II

THE MEANING AND SCOPE OF REQUIREMENTS, CONCEPTS AND TERMS RELATING TO LIMITATIONS OR RESTRICTIONS ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

125. Like all other legal rules, norms recognizing or conferring rights or imposing limitations on them are subject to a continuing process of interpretation.

126. In this connection, the meaning and scope of the following basic requirements, concepts and terms relating to limitations or of restrictions on human rights and freedoms are examined.

A. The requirement "determined by law",[106] "pursuant to law",[107] "prescribed by law",[108] "established by law",[109] or "provided by law"[110]

1. GENERAL OBSERVATIONS

127. The principle should be accepted that human rights, although protected by the Universal Declaration of Human Rights and secured by the International Covenants on Human Rights, must be exercised in accordance with the law of the State.[111] However, that law and its application must not be such as to be contrary to the purpose and the spirit of those international instruments.

128. Democracy must have its foundation in respect for the law.[112] That law must be just, otherwise it would be interpreted as authorizing States to impose any limitations or restrictions they wished.

129. The words "determined by law", "prescribed by law", "established by law" or "provided by law", unless qualified, would mean in effect that the State would be able to avoid its international obligations in the matter by enacting laws limiting the individual's rights and freedoms. This problem was faced and solved by the drafters of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) of ILO. Article 8, paragraph 1, of that Convention provides that:

> In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

130. In order to obviate the possibility of a State avoiding its international obligations in the matter of enacting laws limiting the freedom of association, paragraph 2 of the above-mentioned article provides that:

> The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.[113]

131. As, by virtue of the Constitution of the International Labour Organisation, the International Court of Justice is endowed with compulsory jurisdiction in disputes relating to the interpretation and application of conventions concluded under the auspices of the Organisation, and as that Constitution also provides for machinery for dealing with complaints by organizations of workers and employers against alleged violations of the convention, the principle adopted in article 8, paragraph 2, of the above-mentioned Convention is both novel and far-reaching, inasmuch as it subjects the limitations grounded in national law to the overriding limitations of the principal obligation undertaken in the Convention.

132. The "saving" clause or the "general limitation" clause is both essential and unavoidable for the interpretation of the provisions relating to limitations or restrictions in the International Bill of Human Rights.

133. Whenever law is the expression of the general will and all citizens have the right to participate, in person or through representatives, in its framing, as is provided for by the Declaration of the Rights of Man and of the Citizen of 1789, conflict between law and the freedom of citizens is excluded. This is also one of the results of the conception formed by Rousseau of the nature of law. Law can only be a guarantor of freedom.[114]

134. Law may mean natural law or positive law. Reference is made here particularly to national positive law.

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[106] Universal Declaration of Human Rights, art. 29, para. 2; International Covenant on Economic, Social and Cultural Rights, art. 4.

[107] International Covenant on Civil and Political Rights, art. 5, para 2.

[108] International Covenant on Economic, Social and Cultural Rights, art. 8, para. 1 (*c*).

[109] International Covenant on Civil and Political Rights, art. 9, para. 1.

[110] *Ibid.*, art. 12, para. 3.

[111] In the constitutional theory of Athenian democracy, the following principles prevailed: in the fourth century, the principle "the people has the right to do what pleases it" was pushed to the furthest limits; it was even sovereign over the law. In the fifth century, of Athenians as of Spartans, one can say, both of their public and of their private life, "They are free but they have not an absolute freedom, for above them is a master, the law". G. Glotz, *The Greek City and Its Institutions* (London, Routledge, 1965), pp. 133–134.

[112] In this connection, see part one, paras. 216–229.

[113] See, *inter alia, Freedom of Association: Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO* (Geneva, International Labour Office, 1972), decision 64, p. 26.

[114] E. A. Daes, "Restrictions and limitations on human rights" in Institut international des droits de l'homme, *René Cassin: Amicorum Discipulorumque Liber* (Paris, Pedone, 1971), vol. III, p. 82.

135. "Written law" means any law and subordinate legislation and includes legislative decrees, acts, orders, proclamations, rules, by-laws and any administrative regulations, enacted or issued by the legislative authority or any body or person having power or authority under law to make or issue them.

2. The concept of the national constitution and its hierarchical position

136. It should be accepted that the law must be presumed to be constitutional unless proved otherwise.

137. In the examination of the legal protection of an individual's right and freedoms in the hierarchy of norms, clauses on the rights and freedoms of the individual gain real significance if they are included in constitutions which possess a hierarchically superior position in the national legal order, or which have added formal legal validity. Where this is present, the rights which such constitutional clauses provide are in many countries called fundamental rights. But it is not easy to define the specific nature of these clauses on fundamental rights. This depends partly on how the constitution, and particularly its clauses on fundamental rights, functions as part of the practical administration of justice in any given State, what its role is, and, more especially, how the possible hierarchical supremacy becomes apparent.[115] Since, from the technical point of view, constitutions, and in particular their clauses on fundamental rights, function differently in different States, fundamental rights in their functions may accordingly differ in their legal structure and applicability. Where the hierarchical supremacy of constitutions is present, this is mainly the result of historical development. Sometimes, it is the outcome of different political forces and has evolved differently in different countries according to the circumstances.

138. Thus, the emigrants to the new continent of North America, after setting up communities, strove to guarantee their freedom and rights. This attitude of the emigrants was strengthened as a result of controversies between the colonies and the mother country.

139. The civic rights were included in the constitutional documents of the colonies, that is, the charters (or the bills of rights which were adopted as annexes to the charters, or sometimes separate from them). Any provisions of the statutory laws in the colonies which were in conflict with the provisions of the charters or the basic principles of the legal systems were often subjected to judicial review by the courts and ultimately by the Judicial Committee of the Privy Council in London. During the third quarter of the eighteenth century, great efforts were made, often before the courts, to refer to those clauses and to the common legal principles of both the colonies and the mother country in order to have declared invalid even laws enacted by the Government in London, on the grounds that they were contrary to basic clauses.[116] These clauses took on a clear legal significance, restraining Parliament for the first time, with the adoption of the Declaration of Independence in 1776 and the constitutions that were adopted thereafter, especially the clauses included by the amendments of 1791 in the Constitution of the United States of America so as to cover the combined States. This Constitution has had a great influence on the development of clauses relating to the individual's fundamental rights in other countries and on the application of law in general.

140. The hierarchical superiority of the clauses of the United States Constitution is also shown by the fact that the procedure for amending the Constitution, under which it is necessary to obtain favourable votes from a vast majority of Congress and of the States, differs so greatly from the procedure for enacting ordinary legislation, in which a simple majority vote in each legislative house is sufficient. For all these reasons, this Constitution was regarded as a prototype of a legal document exemplifying the doctrine of the hierarchical supremacy of constitutions.[117]

141. The United States Constitution of 1787 and the amendments thereto of 1791 derive their importance partly from the fact that they served a federal State, but above all from the fact that the courts of the country are entitled to examine the constitutional validity of laws enacted by the Legislature.

142. This prerogative was first adopted by the courts of the United States and thereafter developed into a most important legal institution. It has been one of the main examples of the significant part which the Constitution has played in that country from the very beginning. The United States Supreme Court quickly obtained such prestige that it could, even without any express provision of the Constitution, subject to its investigation the question of a possible conflict between a provision in statutory law and the Constitution and in case of such conflict refuse the application of the provision of the statutory law.[118]

143. As the guarantor and interpreter of the Constitution, the Supreme Court has essentially improved and moulded its content and has sometimes played a central part in political and legislative activity. This role has occasionally led to serious political and con-

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[115] When using the term "function", the Special Rapporteur implies that the fundamental right is the function of the particular constitutional practice.

[116] A. H. Kelly and W. Harbison, *The American Constitution: Its Origins and Development* (New York, W. W. Norton, 1948), pp. 45–55; W. B. Graves, ed., *Major Problems in State Constitutional Revision* (Chicago, Public Administration Service, 1960), p. 6; S. E. Morison, *Freedom in Contemporary Society* (Boston, Little, Brown, 1956), pp. 15–28.

[117] Some other States had earlier regarded it as necessary to write down in a document the fundamental principles upon which their government should in future be established and conducted. The earliest examples in modern history were: the Act of Union of the Provinces of the Netherlands of 1579, the Form of Government of 1634 in Sweden and the short-lived Instrument of Government of 1653 in the United Kingdom. None of these had, however, obtained any hierarchically superior position over the regular laws. See K. C. Wheare, *Modern Constitutions* (London, Oxford University Press, 1951), pp. 3, 13 and 34.

[118] The United States Supreme Court adopted this principle for the first time in 1803. Chief Justice Marshall said that this power of the Court was quite naturally consequent on the duty of the judge to decide what the law in the disputed case was; if two provisions—one in a regular law and the other in the Constitution—lead in the case under dispute to opposite results, then according to this theory it is the duty of the court to decide this legal controversy by applying the higher provision, i.e. the provision of the Constitution. See B. Schwartz, *American Constitutional Law* (Cambridge, England, Cambridge University Press, 1955), pp. 10 and 11.

stitutional crises.[119] None the less, as has already been remarked, the clauses of the Constitution have a basic importance in the legal life of the United States in general and in court practice in particular.

144. It should also be noted that in other countries, the hierarchical position of the constitution is regulated differently. For instance, it is well known that there is no written constitution in the United Kingdom of Great Britain and Northern Ireland, but only various statutes, which, in the method of their creation, are comparable with the regular laws. Some of these statutes are quite old and regulate certain special questions which relate to the basis of the State order or which are otherwise important as regards the legal status of the citizen. A major part of the Constitution depends, in that country, on the norms of the common law or on the conventions which have arisen in habitual practice but which cannot be applied by the courts and which, in many other respects, differ from what has customarily been regarded as characteristic of the regular norm of justice. The Constitution as an institution in the United Kingdom is therefore of such a nature that for the most part it really cannot strictly be considered as legal at all.[120] One result is that a legal conflict between the ordinary laws and the Constitution cannot even arise. This does not mean, however, that laws cannot be changed, because of the fundamental constitutional concept that no parliament can bind its successors. None the less, neither the freedom of individuals nor other fundamental rights are actually any less well observed in the United Kingdom than elsewhere, although no account of those freedoms is to be found in any United Kingdom contemporary legal document.[121] Also there are no clauses with a hierarchically superior position restricting the power of the legislature. As is customarily accepted, the Constitution of the United Kingdom is flexible and not rigid.

145. The French Revolution had an extensive influence on social and political events in Europe. The highly revolutionary ideas of 1789 in France, and later in many other countries following its example, gave birth to the modern concept of the constitution.[122] Thus, with that Revolution the idea of a representative assembly became paramount in the State structure, especially since it was destined to express the revolutionary spirit of the time. The doctrine of the sovereignty of the people, which was one of the central ideas of the Revolution, did not empower courts which had been bureaucratically organized to determine the limits of the new Legislative Assembly, which expressed the real will of the people. The French constitutions[123] were rigid to the extent that the regular legislative organ, the Parliament, could not amend their clauses by a normal majority vote. Theoretically, the power creating the constitution, the *pouvoir constituant*, was designated from the very beginning as being separate and distinct from the legislative power and as belonging in any case solely to a separate national assembly or to the people themselves. All that Parliament could do to mould the constitution was to interpret it. This power of the Parliament with respect to the interpretation of the constitution was quite important, because Parliament in using it acted as the supreme organ expressing the will of the people and could therefore give such an authoritative interpretation to the constitution that the courts had to be satisfied with it. Thus, because of this initial situation, it was almost predetermined that the courts could not be allowed to examine the constitutionality of the laws. The doctrine of the separation of governmental powers, *la séparation des pouvoirs*, was also regarded as prohibiting the courts from dealing with the constitutionality of the laws. Some legal norms and a number of constitutions[124] of the revolutionary period expressly prohibited the courts from interfering with the use of the legislative power or preventing the application of law. The Penal Code, in article 127, provided for punishment for any such infringement.

146. In other States which adopted the French system as their model, and in which the express clauses of the constitution did not entitle the courts to investigate the constitutionality of the law,[125] theoretical and practical difficulties in determining the relationship between statutory laws and the constitution were encountered, especially regarding the articles on fundamental rights. These difficulties have led draftsmen of constitutions to two almost contrary positions: either they have tried to avoid completely the possibility of a controversy or they have tried to invent special arrangements intended to solve any controversy that might arise. A third legislative solution to the problem that has gradually developed makes the court in one way or another the guardian of the constitution. In this regard, Switzerland may be considered as the pioneer. In 1848, articles on the rights of citizens were included in the Swiss Constitution, intended not only as a kind of concession but as real legal guarantees, but the technical arrangement of these guarantees was a special one. A citizen who thought that the legislature of a

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[119] One of these crises occurred in the mid-1930s in connection with President Roosevelt's "New Deal" legislation and it has been suggested that as a result the Supreme Court has of late curtailed the practice of judicial review in the economic field by applying the principle of self-limitation.

[120] E. McWhinney, *Judicial Review in the English-speaking World* (Toronto, University of Toronto, 1956).

[121] H. Street, *Freedom, the Indvidual and the Law* (Harmondsworth, Middlesex, Penguin, 1972), pp. 11 and 12. However, the United Kingdom, having ratified the European Convention on Human Rights, recognizes *inter alia* the freedoms and rights contained in that Convention.

[122] The universal legal term "constitution" was already used in Roman law, in which, however it did not have its present meaning but was used to describe any provision or a group of general provisions. Only in the eighteenth century was the term used in its modern sense (in which it will also be used in the present study), that is to say, to signify such norms as determine the structure of the political community, its legislative and executive organs and their duties and the rights and duties of the citizens in regard to the State. When the constitution is codified into one or several sets of clauses, these are called, on account of their basic significance, fundamental laws. Also, owing to the great differences which the constitution may exhibit in different States, names and concepts connected with it are given different meanings in different connections, and this can cause even terminological misunderstanding.

[123] In particular, those of 1791, 1793, 1795 and 1799.

[124] For example, those of 1791, title III, chap. V, art. 3; and 1795, art. 203.

[125] On the constitutionality of laws as a remedy in cases of violation of human rights, see *Seminar on Amparo, Habeas Corpus and Other Similar Remedies*. Mexico, D.F., 15–28 August 1969 (ST/TAO/HR/12), p. 14.

canton had violated one of the fundamental rights that was his by virtue of the Constitution could turn to the Government, i.e. the Federal Council, against whose decision an appeal could be made, both by the individual concerned and by the canton, to the Federal Parliament but not to the court. However, Parliament had the right to take the case even further by bringing the controversy to the Federal Court. This has actually been done in only one case. All other cases have been definitely decided by Parliament. Only in the constitutional amendment of 1874 was the citizen himself given power, if he thought that the canton law violated a fundamental right guaranteed to him by the Federal Constitution, to take his case to the Federal Court, which is the highest court for civil law, criminal law and most administrative law cases. It should, however, be noted that the power of challenging the federal laws has been abolished by a special clause of the Constitution.[126]

147. In some States, one solution in the series of organizational arrangements by which legal protection has been sought for the application of the Constitution and the fundamental rights guaranteed thereby is to be found in the establishment of a special constitutional court for this purpose. Austria may be regarded as among the first of those States. During the period of the unitary State in 1867, a special constitutional law court, the Reichsgerichtshof, was established with the main task of solving legal disputes which arose from arbitrary actions by the Government against the political rights of the citizens, which were guaranteed in the Constitution. Further, in 1919, after Austria was transformed into a federal State, a constitutional court was created and given competence to declare the laws of both the member states and the federal State void when in conflict with the Constitution and to decide also other cases based on the Constitution, regardless of whether they dealt with fundamental rights, with disputes of competence between the highest organs of the State, or with the responsibility for their official acts. None the less, a question concerning the constitutionality of a law could be brought up solely by the Government of the federal State or a member state. In 1929 the highest courts were given power to refer a pending case to the constitutional law court.[127]

148. Since the Second World War, the creation of constitutional law courts with special competence for guaranteeing the application of the constitution seems to have gained ground, although the detailed organization of such courts has differed from one State to another.[128] Thus, a Federal Constitutional Court has been established in the Federal Republic of Germany.[129] Every citizen of this State, subject to certain conditions, has the right to resort finally to lodging a constitutional complaint and to have any violation of his fundamental rights as guaranteed by the Constitution examined and resolved by the Federal Constitutional Court, when such violation is caused by an official or even by the legislature.

149. In other States, the constitutional court is competent to review the constitutionality of laws and by-laws.[130]

150. In certain States, the courts may investigate the constitutionality of laws even without any express clause entitling them to do so.[131]

151. The requirement of placing the constitution clearly above the ordinary laws is also strengthened by the fact that those legal rules which are on an even higher level in the hierarchy of norms than the constitution, namely, the rules of international law, attract more and more attention in the modern world.

B. The meaning of the terms "arbitrary" and "arbitrarily" as used in the Universal Declaration of Human Rights and the International Covenants on Human Rights

152. During the elaboration of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the words "arbitary" and "arbitarily" were among those which provoked the greatest discussion.[132]

153. They were retained in article 9, article 12, article 15, paragraph 1, and article 17, paragraph 1, of the Universal Declaration and in article 6, paragraph 1, article 9, paragraph 1, article 12, paragraph 4, and article 17, paragraph 1, of the International Covenant on Civil and Political Rights.

154. A concrete and correct interpretation of these articles and of limitations and restrictions upon human rights depends largely on the meaning of the words "arbitrary" and "arbitrarily".

155. The need to examine the meaning of these words has become more urgent since the entry into force of the International Covenant on Civil and Political Rights and the Optional Protocol thereto.

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[126] Federal Constitution of the Swiss Confederation, art. 113, para. 3.

[127] F. Ermacora, *Der Verfassungsgerichtshof* (Graz, Verlag Styria, 1956), pp. 77 and 78.

[128] Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, *Verfassungsgerichtsbarkeit in der Gegenwart*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. 36 (Cologne, Carl Heymanns, 1962).

[129] G. Leibholz, "The Federal Constitutional Court in the constitutional system of the Federal Republic of Germany", in *Legal Essays: A Tribute to Frede Castberg on the Occasion of His 70th Birthday, 4 July 1963* (Oslo, Universitetsforlaget, 1963), p. 595 ff.

[130] For example, Cyprus. See on this question the reply of the representative of the Government of Cyprus to the Human Rights Committee, in *Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-second session, Supplement No. 44* (A/32/44), para. 118 (*c*). See also article 147 of the Constitution of Turkey of 1961, in Peaslee, *op. cit.*, 3rd revised ed., vol. II (1966), pp. 1156–1193.

[131] In Norway and Denmark, for example. With respect to the United Kingdom Constitution, see D. C. M. Yardley, "The British Constitution and the rule of law" in *Jahrbuch des Öffentlichen Rechts der Gegenwart* (Tübingen, Mohr, 1964), New Series, vol. 13, pp. 129–138. Though the constitutions of the Commonwealth countries do not in general include an express clause on judicial review, it is interesting to note that the tradition of the Privy Council practice of colonial and Dominion times was transferred to the Supreme Court in each independent Commonwealth country and accepted without difficulty as a means of constitutional review. In particular, with respect to the 1960 Constitution of Cyprus and its Supreme Constitutional Court, see C. G. Tornaritis, *Constitutional and Legal Problems of Cyprus* (Nicosia, 1968), pp. 5–24; and P. G. Polyviou, *Cyprus in Search of a Constitution* (Nicosia, 1976), pp. 16 and 17.

[132] See part one, paras. 6–47; and chapter I above, paras. 14–77.

156. The general view is that the words are vague and undefined.

157. A number of the new States of Africa and Asia, which did not take part in the drafting of the Universal Declaration or of the International Covenant on Civil and Political Rights, may eventually be concerned to know the precise meaning of these words and the exact nature of the obligations and responsibilities they assume under articles containing the word "arbitrary".

158. Examination of the words "arbitrary" and "arbitrarily" is also necessary from the point of view of implementation of a State party's obligations under the above-mentioned Covenant. It would help to define, for national courts, the extent of the obligations of a State party contained in articles in which the words in question are included.

159. At the international level, the Human Rights Committee[133] would have to ascertain the meaning of the word "arbitrary" if the laws or acts or other administrative measures adopted by the Government of a State party were to be challenged.

160. Does the word "arbitrary" mean "illegal" or does it mean "unjust"?

161. If it means merely "illegal" all oppressive acts of the Administration would be unassailable so long as they were in accordance with national laws.

162. Consequently a part of the question concerning admissibility of complaints brought before the Human Rights Committee would turn on the word "arbitrary".

163. This is not the only vague word used in the above-mentioned Covenant and the Optional Protocol.

164. Words such as "unreasonable" and even "communication" appear in certain articles.[134]

165. Any comprehensive analysis of the meaning of the words "arbitrary" and "arbitrarily" as employed in the International Covenant on Civil and Political Rights will take into account the use of these words in the corresponding articles of the Universal Declaration.

166. The presence of the word "arbitrary" in the articles of the Universal Declaration facilitated its inclusion in the above-mentioned Covenant.

167. Both these documents have always been regarded as constituent parts of one composite "International Bill of Human Rights".[135]

168. The word "arbitrary" appears to have been indispensable in the drafting of several articles of the Universal Declaration. The word itself was not used by any one particular State or in the context of any particular legal system. Its retention in the final elaboration of certain articles of the Universal Declaration may be traced to the proposals and support of many Governments.[136] However, the support was not unanimous. There were those who suggested its deletion. Even among those who supported the retention of the words "arbitrary" and "arbitrarily" there was some difference of opinion as to their meaning.

169. In the opinion of the Special Rapporteur, which is based mainly on the preparatory work of the relevant articles of the Universal Declaration and the International Covenant on Civil and Political Rights, the reason for the use of the words "arbitrary" or "arbitrarily" was to protect individuals from both "illegal" and "unjust" acts.

170. The following are among the arguments that can be adduced in support of this basic conclusion:

(*a*) The desirability of subjecting the "laws" of a particular Government to norms of justice was stressed, at nearly every stage of the drafting of the Universal Declaration and the International Covenants;

(*b*) It is clear that through the extensive debates that occurred in the Commission on Human Rights and in the Third Committee of the General Assembly, the words "arbitrary" and "arbitarily" gradually came to have a "special meaning";[137]

(*c*) Regardless of the explanatory statements made in the Commission on Human Rights and in the Third Committee with regard to the meaning and scope of "arbitrary" and "arbitrarily", formal attempts to equate these words with the word "illegally" were overwhelmingly voted down;

(*d*) The discussion pertaining to the adoption of article 29, paragraph 2, of the Universal Declaration indicated that, in stipulating that all legal limitations should have a just basis, the provision limits the powers of restriction to clearly defined circumstances. It does not recognize to the national legislature full power to modify rights and freedoms in an arbitrary and excessive fashion.[138]

171. One author has written that article 29, paragraph 2, of the Universal Declaration creates a distinction between "legality" and "legitimacy". He mentions, *inter alia*, that the criterion for what is "legitimate" is to be found beyond the law that is being examined. Thus a law that is contrary to international

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[133] See Introduction, para. 49, and footnote 26.

[134] Most members of the Human Rights Committee agreed that the terms used in the drafting of the Covenant were not always very clear; that the word "communication" had probably been chosen as a neutral term and could not be considered out of context, since the communication actually constituted a claim that a State was not fulfilling its obligation. The communication was therefore not merely a formal document but contained the substance of the matter that the Committee had to consider under article 41 of the Covenant. See *Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-fourth session, Supplement No. 40* (A/34/40), para. 35.

[135] See E. A. Daes, "Protection of minorities under the International Bill of Human Rights and the Genocide Convention", in *Xenion: Festschrift für Pan. J. Zepos*, vol. II (Athens, Ch. Katsikalis, 1973), pp. 55-56.

[136] Including the Governments of Chile (A/C.3/249), Cuba (A/C.3/232), France (E/CN.4/82/Add.8 and E/CN.4/AC.1/SR.40), New Zealand (A/C.3/267), Panama (A/C.3/220), the United States of America (E/CN.4/36), and the USSR (E/800, pp. 41–42).

[137] The attitude of Jiménez de Aréchaga (Uruguay) constitutes a good example. When the word "aribitrary" was first discussed in the Third Committee in connection with article 9 of the Universal Declaration he objected to the word and suggested its deletion. Later, when the word "arbitrarily" was discussed in connection with article 17 of the Universal Declaration, he was in favour of its retention, probably because by that time its implications were clear.

[138] See R. Marcic, "Duties and limitations upon rights", *Journal of the International Commission of Jurists* (Geneva), vol. IX, No. 1 (June 1968), pp. 64–72.

law or to general principles of law and a constitution that is contrary to international law may be legal but they are not legitimate.[139]

172. This conclusion is also supported by the relevant preparatory work. The Third Committee of the General Assembly specifically included the word "just" before the word "requirements" in article 29, paragraph 2, in order to reflect its concern to prevent "arbitrary acts", "tyrannical laws", "unjust laws", etc.[140]

173. Although the drafters of the Universal Declaration were representatives of Governments their conviction was that, as expressed in the preamble of the Universal Declaration, the essential purpose of the document they were drawing up was to proclaim the inherent dignity and inalienable rights of all human beings and that that could only be accomplished by limiting the "legal" discretion of Governments.

174. One writer[141] argues that the term "arbitrary" introduces the requirement of "justice".

175. One of the conclusions of a study prepared by a committee appointed by the Commission on Human Rights[142] is that the word "arbitrary" in article 9 of the Universal Declaration is not synonymous with "illegal", and that the former signifies more than the latter.

176. A similar interpretation of the word "arbitrarily", employed in article 15 of the Universal Declaration, is also evident in various international conventions, for example, those relating to nationality.[143]

177. In particular, provisions on the loss of nationality in some of these conventions recognize that the international community should conform to certain minimum standards.[144]

178. A review of United Nations action taken with regard to the policy of *apartheid* practised in South Africa reveals that the relevant articles of the Universal Declaration have been understood to impose standards of justice beyond municipal laws.

179. For example, the *Ad Hoc* Working Groups of Experts appointed by the Commission on Human Rights to investigate charges concerning the denial of human rights in South Africa found, *inter alia*, that certain laws of that country violated the provisions of article 9 of the Universal Declaration, which reads: "No one shall be subjected to arbitrary arrest, detention or exile".[145]

180. Finally, the distinction between "illegally" and "arbitrarily" was maintained in a separate opinion in the Anglo-Iranian Oil Company case before the International Court of Justice. Dissenting from the judgement of the Court in that case, Judge Levi Carneiro invoked article 17 of the Universal Declaration, which reads: "No one shall be arbitrarily deprived of his property", and argued that the Iranian Government's nationalization was not in accordance with the principles of international law.[146]

C. "Arbitrary interference" and "arbitrary or unlawful interference"

181. A distinction should be made between the meaning and scope of the concepts "arbitrary interference"[147] and "arbitrary or unlawful interference".[148] Interference by public authorities could be lawful and yet arbitrary; interference by a private person would be "unlawful".[149]

182. The meaning of the expression "unlawful attacks on his honour and reputation" and in particular the insertion of the word "unlawful" before "attacks" was intended to meet the objection that, unless qualified, the clause might be construed in such a way as to stifle the free expression of public opinion. The law could protect an individual only against "unlawful" or "abusive" or "unwarranted" attacks on his honour and reputation, and fair comments or truthful statements which might affect an individual's honour or reputation should not be considered as "attacks on his honour and reputation".

183. In some cases, the International Covenants on Human Rights allow national authorities a certain margin of appreciation. For example, article 8, paragraph 1 (*a*) of the International Covenant on Economic, Social and Cultural Rights and article 12, paragraph 3, article 14, paragraph 1, article 18, paragraph 3, article 21 and article 22, paragraph 2, of the International Covenant on Civil and Political Rights deal with permitted limitations or restrictions on the exercise of rights protected by those articles. The Covenants accept such limitations or restrictions as are prescribed by law and are "necessary" in "a democratic society" for the sake of various grounds enumerated in the above-mentioned articles. In this connection, it should be mentioned that when deciding what is "necessary" in this respect, the assessment of the competent national authorities cannot be ignored. However, the Government's judgement should be subject to review by the national courts or the Human Rights Committee established under the International Covenant on Civil

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[139] *Ibid.*, p. 65, footnote 6.

[140] See the summary records of the 153rd, 154th and 177th meetings of the Third Committee of the General Assembly, *Official Records of the General Assembly, Third Session, Part I, Third Committee*, pp. 642–665 and p. 871. See also E. A. Daes, "Restrictions and limitations on human rights", *loc. cit.*, p. 79.

[141] J. Jiménez de Aréchaga, "The background to article 17 of the Universal Declaration", *Journal of the International Commission of Jurists* (Geneva), vol. VIII, No. 2 (December 1967), pp. 34–39.

[142] *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* (United Nations publication, Sales No. 65.XIV.2), para. 27.

[143] See the second preambular paragraph of the Convention on the Nationality of Married Women.

[144] See, for example, the preamble of the Convention on the Nationality of Married Women.

[145] See "Report of the *Ad Hoc* Working Group of Experts set up under resolution 2 (XXIII) of the Commission on Human Rights" (E/CN.4/950 of 27 October 1967), para. 1124.

[146] *Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952: I.C.J. Reports 1952*, p. 168.

[147] Universal Declaration of Human Rights, art. 12.

[148] International Covenant on Civil and Political Rights, art. 17.

[149] *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (Part II), document A/2929, chap. VI, paras. 99–101.

and Political Rights, or other international organs, or provided for by international or regional conventions to which the State concerned is a party.

184. The word "may" was used instead of "shall" in certain articles[150] of the International Covenants relating to the imposition of limitations or restrictions on human rights, in order to make it clear that States parties would in no way be obliged to impose limitations or restrictions.

D. The term "due process of law"[151]

185. The development of the term "due process of law" is a product of English law. Its origin is traced to the "law of the land" clause in Magna Carta. In chapter 3 of the Statute 28 Ed. III (1355) the "law of the land" clause was replaced with "due process of law".

> No man of what state or condition he be, shall be put out of his lands or tenements, nor taken, nor imprisoned nor disinherited, nor put to death, without he be brought to answer by due process of law.[152]

Both expressions are identical in their meaning and signify nothing more than "due process of the common law", that is, an "indictment or presentment of good and lawful men . . . or a writ original of the common law". Both phrases, in short, were intended to consecrate certain methods of trial, and neither bore any reference to the principles of "common right and reason".

186. The most important word in the clause is the word "due". It cannot be explained except in relation to some point of reference. Here, in this clause, the point of reference of "due" is "law", and therefore the meaning of the clause is to be determined by the meaning given to the word "law". In England, the law meant the common law of England and process was "due" if it was in accordance with the common law. There was no intention that the clause should give protection against the law. In *Davidson* v. *New Orleans*, Justice Miller said:

> . . . when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against enactment of laws by the Parliament of England.[153]

187. The purpose of the clause was not to set up a limitation of power but to confine the exercise of governmental powers to an accepted procedure, so that the capricious exercise of power might be prevented. Many of the state constitutions in America contain the "due process of law" clause, but the Massachusetts Constitution still reads, in article 12:

> No subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgement of his peers, or the law of the land.

188. In the early period, the American courts used to refer expressly to Magna Carta and to its "law of the land" clause. In a North Carolina case involving the law of the land clause, it was interpreted as signifying simply a "law for the people of North Carolina made or adopted by themselves by the intervention of their own legislature".[154] It was generally accepted that due processes were those processes which were established by "the common and statute law of England prior to the emigration of [our] ancestors", and the words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land" in Magna Carta. Lord Coke in his commentary on those words[155] says they meant due process of law.

In *Murray's Lessee* et al. v. *Hoboken Land and Improvement Co.*, the Supreme Court stated:

> To what principles, then, are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[156]

189. But the question which troubled the courts at that period was whether the legislature by an enactment could violate the provisions of Magna Carta and the procedure established by the common law of England before the emigration. Could the legislature by a law deprive a man of life, liberty or property without the judgement of the court? The North Carolina case had answered that question in favour of the legislature, but generally the answer was in the negative. Thus, in *Murray's Lessee* et al. v. *Hoboken Land and Improvement Co.*, the Supreme Court, referring to the fifth article of amendment of the Constitution, said: "The article is a restraint on the legislative, as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law' by its mere will."[157] If so, should those procedures established by the common and statute law of England before emigration remain permanent? Was there no way to innovation to meet the needs of a growing society? The courts then used to act upon the principle that new procedures were due process if they served the ends of substantial justice. In the Dartmouth College case,[158] Webster defined "due process of law" as "the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after

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[150] For example, article 4 of the International Covenant on Economic, Social and Cultural Rights. However, the word "may" in article 22, para 2, of the International Covenant on Civil and Political Rights has a more mandatory character.

[151] This has been included in many modern constitutions, e.g., that of India.

[152] See G. R. C. Davis, "The making of Magna Carta", in *Magna Carta*, rev. ed. (Oxford, Oxford University Press, 1977), pp. 9 ff.

[153] 96 U.S. 97 (1877).

[154] E. S. Corwin, *Liberty against Government: The Rise, Flowering and Decline of a Famous Juridical Concept* (Baton Rouge, Louisiana State University Press, 1948), p. 91.

[155] Sir Edward Coke, *The Second Part of the Institutes of the Lawes of England* [1642] (New York, Garland Publishing, 1979), p. 50.

[156] 18 Howard 272 (1855).

[157] *Ibid.*, p. 276.

[158] *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. 518 (1819).

trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society."

190. As the struggle with the mother country—England—intensified, however, Americans were increasingly prepared to accept the doctrine that there were fundamental legal principles beyond the power of the legislature to disturb and that the courts, not the legislature, might be the organs of the State to enforce compliance with them.

191. Thus some Americans, aware of the political realities of that period, supported the overthrow of legislative authority and the establishment of a new policy in which the legislature was limited by an express fundamental law enforced by the courts.

192. But what of the Fourteenth Amendment's "due process clause"? In *Hurtado* v. *California* in 1883;[159] the Supreme Court refused to hold that "due process" required a grand jury indictment in a felony prosecution, even though the Fifth Amendment expressly required a grand jury indictment in federal prosecutions. "Due process", said the Court, was not synonymous with process prescribed by the Bill of Rights. Over two decades later, in the 1908 case of *Twining* v. *New Jersey*,[160] the Court ruled that exemption from self-incrimination, though specifically secured by the Fifth Amendment, was not safeguarded against state action by the Fourteenth Amendment's "due process clause". The Bill of Rights was not to be relied on to determine what rights were protected by due process. Some of the rights safeguarded by the first amendments against national action might also be safeguarded against state action, because a denial of them would be a denial of due process of law. Yet that was not because those rights were enumerated in the Bill of Rights, but because they were of such a nature that they were included in the concept of due process.

193. Some modern national constitutions have incorporated the clause "due process of law".[161] Its meaning and connotation have varied from time to time and from judge to judge. However, "law" is the point of reference of the term "due" in the clause, and it is not easy to give the term any definite meaning when that point is liable to constant variation.

194. In this connection, it might be said that anything which is considered reasonable by the judges is also considered to be "due". But how should this reasonableness be determined? Each judge should consider it in the light of his personal standard of reasonableness and the majority decision must prevail. If the object of the law is reasonable, if the means adopted are reasonable, if there exists a reasonable nexus between the object and the means, then the law can sustain its validity.

195. The term "due process of law"[162] is essentially a control over the plenary power of the legislature, and all limitations or restrictions on constitutionally protected rights are subject to judicial review based on the criterion of reasonableness.[163]

196. In short, the legislature may exercise its power to any extent, so long as it is not disapproved by an independent judiciary.

E. Respect for the rights and freedoms of others

197. Every moral or legal right of the individual is by definition an interest which in greater or lesser degree has the protection of law. The protection is in the first instance against the violation of his rights by other individuals; and this is true of what are considered as human rights no less than of other rights.[164] The right of everyone to form trade unions and to join the trade union of his choice, the right of trade unions to function freely,[165] the right to liberty of movement and freedom to choose one's residence, the right of peaceful assembly, and the right to freedom of association,[166] for example, are all rights the security of which depends mainly on other individuals being effectively restrained by law from violating them.[167]

198. Thus, it is in a complex network of provisions of constitutional, criminal and civil law that what is conceived of as "human rights and freedoms" find their basic guarantees in relation to other members of the community.

199. Furthermore, since one individual's right or freedom used to excess may mean the destruction or impairment of that of others, these provisions are intended to find the just balance between man and man and to draw a line between an individual's use and abuse of his rights and freedoms.[168] Such, for example, is obviously the case with the provisions of the law of many countries concerning defamation, negligence, public meetings and processions in public places.

200. Accordingly, the very concept of the reasonable man, which is so characteristic of many legal systems, is an expression of that aspect of the legal protection of the rights and freedoms of the individual.

201. Events since the Second World War have forced upon the attention of the members of the international community the fact that the protection of the individual vis-à-vis his fellow man is no less vital to the enjoyment of his human rights and freedoms than his protection against the arbitrary power of the State.

202. The multiform problems which confront contemporary communities under the heading of the pol-

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[159] 110 U.S. 516 (1883).

[160] 211 U.S. 78 (1908).

[161] See, for example, the Constitutions of Canada, India and Sri Lanka.

[162] See W. S. Tarnopolsky, *The Canadian Bill of Rights*, 2nd rev. ed. (Toronto, McClelland and Stewart, 1975). See also the replies of the representative of Cyprus to questions put by members of the Human Rights Committee in *Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-second Session, Supplement No. 44* (A/32/44), para. 118.

[163] See the replies of the representative of Tunisia to questions put by members of the Human Rights Committee, *ibid.*, para. 121.

[164] Sir Humphrey Waldock, "The legal protection of human rights—national and international", in Sir Francis Vallat, ed., *An Introduction to the Study of Human Rights* (London, Europa Publications, 1971), p. 83.

[165] International Covenant on Economic, Social and Cultural Rights, art. 8, para. 1 (*a*) and (*c*).

[166] International Covenant on Civil and Political Rights, art. 12, para. 3, and arts. 21 and 22.

[167] See in this connection *Seminar on Special Problems relating to Human Rights in Developing Countries*, Nicosia, Cyprus, 26 June–9 July 1969 (ST/TAO/HR/36, paras. 122–141.

[168] See paras. 334–351 below.

lution of the environment, the technological threat to the individual's privacy, sit-ins and demonstrations, kidnapping, hijacking, etc., are all matters which concern individual rights and freedoms.

203. The protection of the individual vis-à-vis his fellow man within his own community is largely considered as falling primarily within the competence of national law.

204. Rights and freedoms exercised for the purpose of destroying the rights or freedoms of others should lose all legal protection under national law and the international human rights instruments, in so far as they are exercised for that purpose.

F. The term "morality"[169] or "morals"[170]

205. The term "morality" is derived from the Latin *mores*, meaning customs. No certainty exists as to how moral *mores* were. The French word *moeurs* connotes a high standard of conduct. Significantly, the German word *Sitten* includes in its compass etiquette and politeness.

206. Morality being the noblest product of culture, it is the duty of all to respect it.[171]

207. *Black's Law Dictionary* gives the following definition of the term "moral":

> (*a*) Pertaining or relating to conscience or moral sense or to the general principles of right conduct;
>
> (*b*) Cognizable or enforceable only by the conscience or by the principles of right conduct, as distinguished from positive law;
>
> (*c*) Depending upon or resulting from probability; raising a belief or conviction in the mind independent of strict or logical proof;
>
> (*d*) Involving or affecting the moral sense; . . .[172]

208. Moral law is the law of conscience, the aggregate of those rules and principles of ethics which relate to right and wrong conduct and prescribe the standards to which the actions of men should conform in their dealings with each other.

209. The moral-legal dialogue proper is conducted when a fundamental human right is being considered, as when, for example, Lord Mansfield pronounced the status of slavery to be incompatible with English law. This was followed by the statutory prohibition of the slave trade.[173]

210. The State may claim on two grounds to legislate on matters of morals. The Platonic ideal is that the State exists to promote virtue among its citizens. If that is its function, then the majority in a democratic State must have the right and the obligation to declare what standards of morality are to be observed as virtuous and must ascertain them as it thinks best. The alternative view is that a State through its competent organs may legislate to preserve itself. This is the basis when the purpose of the law is to conserve the moral welfare of the State.

211. A law that enforces moral standards must, like any other law, be enacted by the appropriate constitutional organ, the legislature.

212. The laws governing relations between nations, whether in the form of public international law or private international law, being based on minimum standards, necessarily fall short of high moral standards. A series of efforts to raise international moral standards took the form, for example, of the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the United Nations Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the European Convention on Human Rights and its five Protocols, the European Social Charter, the International Covenants on Human Rights and other relevant international instruments.

213. If morality has any significance in the ordering of human affairs, the signficance is clearest in the demand for a sense of responsibility. In order that responsibility may be reinforced, the moralist asks of the law that if people are irresponsible they should at least be fairly dealt with by the law.

214. A moral obligation is a duty which is valid and binding in conscience and in accordance with natural justice but is not recognized by the law as adequate to set in motion the machinery of justice—that is, one which rests upon ethical considerations alone and is not imposed or enforced by positive law.

215. Also, it is a duty which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in a particular instance from legal liability.[174]

216. It should be recognized that there is a fundamental difference between the law that expresses a moral principle and the law that is only a social regulation.

217. The term "morality" is also used in international law[175] and international relations. In connection with the use of the term "morality" or "moral" in international co-operation among peoples and nations, mention should be made of article X of the Declaration of the Principles of International Cultural Co-operation proclaimed by the General Conference of UNESCO at its fourteenth session, on 4 November 1966. This article states that cultural co-operation shall be specially concerned with the moral and intellectual education of young people in a spirit of friendship, international understanding and peace and shall foster awareness among States of the need to stimulate talent and promote the training of the rising generations in the most varied sectors. Further, among the legal and moral duties of the State there are some which are basic, such as, for example, the duty of granting to all citizens rights which will ensure the free development of their individuality.

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[169] Universal Declaration of Human Rights, art. 29, para 2.

[170] International Covenant on Civil and Political Rights, art. 12, para 3; art. 14, para. 1; art. 18, para. 3; art. 19, para. 3 (*b*); art. 21; and art. 22, para. 2.

[171] A/C.3/261.

[172] *Black's Law Dictionary*, 5th ed. (St. Paul, Minn., West Publishing Co., 1979), p. 909.

[173] G. Abrahams, *Morality and the Law* (London, Calder and Boyars, 1971), p. 27.

[174] *Black's Law Dictionary*, 5th ed., p. 969.

[175] See L. Oppenheim, *International Law: A Treatise*, vol. I, *Peace*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green 1955), p. 88.

218. An individual cannot be considered as accepting a "moral" principle or a "moral" rule unless he is making a serious attempt to use it in guiding his particular moral judgements and thus his actions.[176]

G. "Public order" (*ordre public*),[177] "public safety", "national security"[178]

219. The meaning and scope of the terms "public order" (*ordre public* in French law), "public safety" and "national security" were among the most controversial questions discussed during the elaboration of the Universal Declaration of Human Rights and the International Covenants on Human Rights.[179]

220. It was observed, *inter alia*, that the English expression "public order" was not equivalent to the French expression "*l'ordre public*" or the Spanish expression "*orden público*".

221. Indeed, these terms are substantially different.

222. Thus, in civil law countries, the concept of *ordre public*[180] is used principally as a basis for negating or restricting private agreements, the exercise of police power or the application of foreign law.[181]

223. Accordingly, it could be said that in the common law the counterpart of *ordre public* is "public policy"[182] rather than "public order".

224. In particular, in common law countries the expression "public order" is ordinarily used to mean the absence of public disorder.[183]

225. It should be emphasized that the inclusion of the term "public order" or "*l'ordre public*" in the provisions of the Universal Declaration and the International Covenants related to limitations or restrictions on certain human rights that would create uncertainty and might constitute a basis for far-reaching derogations from the rights guaranteed by the State.

226. The same observations apply to the term "public safety", which is contained in the limitation provisions of article 18, paragraph 3, and articles 21 and 22 of the International Covenant on Civil and Political Rights, and the term "national safety", which appears in article 19, paragraph 3, and articles 21 and 22 of the same Covenant.

227. Furthermore, the terms "public safety" and "national security" are not sufficiently precise to be used as a basis for limitation or restriction of the exercise of certain rights and freedoms of the individual. On the contrary, they are terms with a very broad meaning and application. Therefore they can be used by certain States to justify unreasonable limitations or restrictions.

228. The terms "public order" and "public safety" constitute the grounds for limitations primarily and basically on the right of peaceful assembly. Nevertheless, experience shows that, even in societies well known to be democratic, unlawful assemblies have often taken place. Therefore, special legislation has been enacted to deal with the problems of riots and unlawful assemblies. An example is the relevant legislation in the United Kingdom. There, it has been affirmed that, since in modern law the concept of unlawful assembly has been more closely related to the present tendency to disturb the peace, the field of application of unlawful assembly and the common law misdemeanour of riot has been very similar. The essentials of the two offences are very nearly the same. A jury may convict of unlawful assembly if it acquits on a riot charge. In this connection, the following basic

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[176] R. M. Hare, *Freedom and Reason* (Oxford, Clarendon Press, 1963), p. 47.

[177] Universal Declaration of Human Rights, art. 29, para.2; International Covenant on Civil and Political Rights, art. 18, para. 3, and arts. 21 and 22. See, in this respect, J. P. Humphrey, "The Universal Declaration of Human Rights: its history, impact and juridical character", in B. G. Ramcharan, ed., *Human Rights: Thirty Years after the Universal Declaration* (The Hague, Martinus Nijhoff, 1979), pp. 27–28.

[178] See, for example, International Covenant on Civil and Political Rights, art. 12, para. 3; art. 14; art. 18, para. 3; art. 19, para. 3 (*b*); and arts. 21 and 22.

[179] See *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (Part II), document A/2929, chap. VI, paras. 112–114.

[180] French jurisprudence has developed the doctrine of *ordre public* on the basis of articles 3 and 6 of the Civil Code. Friedrich Carl von Savigny greatly contributed to the further development of the doctrine of *ordre public* and Pasquale Stanislas Mancini used this doctrine as the corner-stone of international private law. Mancini thought that *ordre public* constituted a rule in private international law, while von Savigny, on the contrary, said that *ordre public* should only exceptionally be permitted a place in international private law.

[181] G. Maridakis, *Idiotikon Diethnes Dikaion* (International Private Law), 2nd ed. (Athens, 1967), vol. A, pp. 336–337; E. G Lorenzen, *Selected Articles on the Conflict of Laws* (New Haven, Conn., Yale University Press, 1947), pp. 1–18; H. J. Abraham "Die Doktrin der Public Policy", *Archiv für die Civilistische Praxis* (Tübingen, Mohr, 1949), vol. 150, pp. 386 ff.; M. Philonenko, "La notion de l'ordre public international", *Journal du droit international* (Paris), 1952; D. Lloyd, *Public Policy: A Comparative Study in English and French Law* (London, Athlone Press, 1953); H. Maury, "L'ordre public en droit international privé français et en droit international privé allemand", *Revue critique de droit international privé* (Paris), vol. 43 (1952), pp. 7–27; P. Lagarde, *Recherches sur l'ordre public en droit international privé* (Paris, Librairie générale de droit et de jurisprudence, 1959), P. H. Neuhaus, *Die Grundbegriffe des internationalen Privatrechts*, 2nd ed. (Tübingen, Mohr, 1976), sect. 50. See also the judgement of the Swiss Bundesgericht of 1 February 1938 in which the following reference was made:

> ". . . der ordre public soll in Fällen, wo grundsätzlich ausländisches Recht anwendbar ist, die Anwendung eines inländischen Rechtssatzes gewährleisten oder die Anwendung eines ausländischen verhindern, wenn sonst das einheimische Rechtsgefühl in unerträglicher Weise verletzt würde." (See R. Haab and M. Staehelin, "Gesetzgebung der Schweiz betreffend Privatrecht, gewerblichen Rechtsschutz und Urheberrecht, Zwangsvollstreckrung und Konkurs in den Jahren 1938 und 1939", *Zeitschrift für Ausländisches und Internationales Privatrecht* (Berlin), 13th year, No. 1/2, p. 613).

In France, the Cour de Cassation, in a judgement of 25 May 1948, declared that the purpose of *ordre public* should be to allow "*les principes de justice universelle*" to prevail (*Revue critique de droit international privé*, vol. 38, No. 1 (January–March 1949). See, further, P. Francescakis, "Droit naturel et droit international privé", in *Mélanges offerts à Jacques Maury* (Paris, Dalloz et Sirey, 1960), vol. I, pp. 113–152.

[182] The term "public policy" is mentioned in the judgements of the United States courts not only in connection with the application of foreign law but also as "public power" in connection with the law in force of another federated state. See T. H. Healy, "Théorie générale de l'ordre public", *Recueil des cours de l'Académie de droit international de La Haye*, 1925–IV (Paris, Hachette, 1926), vol. 9, pp. 411 ff.

[183] Numerous by-laws punish persons who in places of public resort, etc., "behave in a disorderly or offensive manner with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned". See I. Brownlie, *The Law Relating to Public Order* (London, Butterworths, 1968), pp. 101 ff.

definition of the term "riot" may be mentioned:

> A tumultuous disturbance of the peace by three persons or more, who assemble together of their own authority, with an intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually execute the enterprise, in a violent and turbulent manner, to the terror of the people, whether the act intended were lawful or unlawful.[184]

229. In *Field* v. *Metropolitan Police District Receiver*, the Divisional Court stated the "necessary elements" of riot to be: (1) a number of persons, three at least; (2) common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.[185]

230. With respect to "public order" as a ground for imposing limitations, it could be further observed that in a life of give and take, the individual has to behave in a manner imposed by good faith; likewise, in a society organized in a State, an individual has to behave in such a way that "public order" and "public safety" are not disrupted. In this way the action of the State exercises a limitation on individual human rights. Consequently, the limitation of police power constitutes a protection of individual human rights, and the limitation of individual human rights constitutes a lawful police rule or a lawful action. In connection with the role of the police in the protection of an individual's rights and freedoms, some relevant questions are briefly examined below.

1. FUNCTIONS OF THE POLICE

231. The main functions of the police should be the maintenance of law and order, the preservation of public peace and the protection of life, liberty and property, the prevention and detection of crime, the apprehension of offenders and the investigation of crimes.[186]

2. HUMAN RIGHTS AND PREVENTIVE POLICE ACTION

232. As mentioned in the preceding paragraph, one of the main functions of the police is to take preventive measures for the maintenance of public peace and order.

233. Preventive measures in time of emergency must necessarily be different from those which are admissible in ordinary circumstances, and the two categories of measures should be considered separately.

234. A distinction should be made between passive and active prevention by the police for the maintenance of public peace and order. Thus, passive prevention might consist, for instance, in making police activities known to the public, in co-operation with social agencies, in giving advice, and generally in adopting attitudes which have a restraining influence on potential offenders. However, the better known method of "active" prevention[187] has sometimes to be resorted to in certain situations.

235. It is obvious that many preventive measures taken or enforced by the police have the effect of placing restrictions upon the exercise of various freedoms. One of the basic obligations of the police in the preventive field is therefore to remember always that they are dealing with persons who should be presumed innocent and to keep in mind the principles of the Universal Declaration of Human Rights, particularly those established in article 11, paragraph 1, and the relevant provisions of the International Covenants, including those in articles 7 and 9 of the International Covenant on Civil and Political Rights.

236. It is a difficult but necessary task for every State to try to set limits on preventive police action, with a view to safeguarding the fundamental rights of the individual.[188]

237. Preventive police action, particularly in the social field—for example, in establishing juvenile crime, prevention centres, or in acting in the best interests of the weak, derelicts, alcoholics, drug addicts, etc.—is a service to the community which meets with the approval of the public.

238. The following factors, among others, should be mentioned as exerting a restraining influence on the police: control and guidance by the courts, public opinion, a free press and, above all, education, including curricula on human rights and proper training of the police force.

239. It should also be noted that striking the proper balance between the interests of the community and the rights and freedoms of the individual depends essentially upon the efforts of the police themselves together with reasonable legislation.

3. PREVENTIVE MEASURES FOR THE MAINTENANCE OF PUBLIC PEACE AND ORDER IN RESPECT OF PUBLIC MEETINGS AND PROCESSIONS, FREEDOM OF MOVEMENT OF THE INDIVIDUAL AND THE EXTENT OF POLICE DISCRETION AS REGARDS THE USE OF FORCE

(a) *Public meetings and processions*

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[184] *Ibid.*, p. 47.

[185] *Ibid.*

[186] *1963 Seminar on the Role of the Police in the Protection of Human Rights*, Canberra, Australia, 29 April–13 May 1963 (ST/TAO/HR/16 and Corr.1), para. 16.

[187] Active prevention means intervention by the police, supported if necessary by force, with a view to preventing the commission of offences.

[188] In the opinion of some participants in the United Nations seminar on the role of the police in the protection of human rights, particularly among those from Australia and New Zealand, the powers of the police and the scope of their preventive action, even in normal times, had a tendency to expand; for instance, it was felt that the growing concern with juvenile delinquency might conceivably lead to proposals for the control by the police of all entertainments for young persons. The fear was expressed that such an expansion of the scope of preventive action might ultimately subject too many areas of social life to police control, thereby increasing existing threats to human rights. Other participants thought that the police were fully justified in expanding the scope of their preventive action when the objective was to ensure the welfare of the people; to that end, the police, as a socially protective body, should act in the best interests of weak, handicapped or distressed persons, in order to secure their integration in society. For example, a Juvenile Crimes Prevention Section which had been established within the New Zealand police was functioning successfully: with a view to offering preventive guidance to young potential offenders, it had sought and obtained the co-operation of parents. See the report of the seminar (ST/TAO/HR/16 and Corr.1), paras. 26–34.

240. The police should not interfere with the exercise of the right to hold meetings and processions in public places, except when such meetings and processions are likely to obstruct traffic or disturb the peace. In this connection, it should be made clear that if powers were given by law for a particular purpose they should not be used for a different purpose; for example, powers to control traffic should not be used as a mere cover for preventing political meetings.

241. Once permission is granted by the competent authority of the State to hold a public meeting or procession, it is the duty of the police to protect the meeting against undue disturbance or riots, unless the conduct of the meeting causes a disturbance or a riot, in which case the police are bound to restore order, even if this means terminating the meeting.

(b) *Freedom of movement*

242. The Universal Declaration of Human Rights (art. 13), the International Covenant on Civil and Political Rights (art. 12, para. 3), and other relevant international instruments[189] recognize that the right to freedom of movement is subject to certain limitations or restrictions, such as the direct limitations imposed by national security, public order, public health, morals, or the rights and freedoms of others,[190] or the indirect limitations based on economic measures[191] or the general welfare in a democratic society.[192]

243. In this connection, the role of the police should be absolutely restricted to application of the relevant laws providing for limitations based on the grounds mentioned in the preceding paragraphs.

244. It should also be permissible for the police to impose, through administrative measures, certain legitimate restrictions in order, for example, to enforce certain traffic regulations.

(c) *Extent of police discretion as regards the use of force*

245. The police should necessarily be granted some discretion in the carrying out of preventive measures.

246. The question of discretion is particularly complicated as regards the use of force.

247. It is often very difficult for a police officer to decide when and to what extent force should be used in a given situation; the public in general expects policemen to prevent disorder and violence, but at the same time it is prompt to criticize the police for any possible excessive use of power.

248. A spirit of co-operation and understanding between the public and the police in the exercise, in particular, of the right to assembly by individuals would greatly help the police and contribute to avoiding many incidents.

249. In any case, no more force[193] should be used than is believed in good faith and on reasonable and acceptable grounds to be necessary and appropriate in the circumstances; the amount of compulsion used should never be disproportionate to the gravity of the danger to be avoided; but every policeman is justified in carrying out the just and lawful orders of his superiors[194] whom he is in duty bound to obey.

250. It must be underlined that in the laws and practice of States a proper balance must always be kept between, on the one hand, the right of an individual to be presumed innocent until found guilty, his right to remain silent and not to be subject to self-incrimination, and his protection against treatment which might tend to impair his free will and, on the other hand, the general welfare of the community, the need for proper investigation of crime and the requirement of adherence to rules and integrity in carrying out those rules on the part of the police and other authorities. The whole area of investigation of crime by the police involves the preservation of a sense of justice which must permeate their activities and which should be supported by the community at large.

251. Another important question relating to the police and the protection of human rights is the inculcation of moral values and *esprit de corps*, the fostering of which constitutes an essential basis for public confidence in, and respect for, the police. Since the police play an important part in the matter of morality and the protection of the human rights of the individual in general, the members of the police force should be required to understand well what morality is and to act morally themselves. It is the duty of the police to set a moral and good example to the individual in respecting human rights. Therefore, the police should be constantly educated and trained to have self-confidence, self-discipline and integrity, to display moral rectitude in their conduct, not to abuse their powers, and to respect and protect the individual's rights and freedoms.

H. The general welfare

252. Since man identifies himself with his community, he must yield priority to the general welfare,[195] in so far as this is compatible with his human dignity.

253. Every individual should identify himself with the community but not lose his identity in it.

254. The term "welfare" is defined as "well-doing or well-being in any respect; and enjoyment of health and common blessings of life. . . ."[196]

255. In connection with the term "general interest", a distinction should be made between "public" and "general" interests, the term "public" being applied strictly to that which concerns every member of the State, and the term "general" being confined to a

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[189] Protocol No 4 to the European Convention on Human Rights, art. 2; American Declaration of the Rights and Duties of Man, art. VIII; American Convention on Human Rights, art. 22.

[190] International Covenant on Civil and Political Rights, art. 12, para. 2.

[191] See J. D. Inglés, *Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country* (United Nations publication, Sales No. 64.XIV.2), pp. 47–49.

[192] Universal Declaration of Human Rights, art. 29, para. 2.

[193] See for example, the Code of Criminal Procedure enacted in New Zealand in 1961, which contains several provisions regulating the use of force by the police in certain cases.

[194] In connection with superior orders, see part one, paras. 266–272.

[195] Universal Declaration of Human Rights, art. 29, para. 2; International Covenant on Economic, Social and Cultural Rights, art. 4. See also Marcic, *loc. cit.*, p. 61.

[196] *Black's Law Dictionary*, 5th ed., p. 1430.

lesser, though still considerable, part of the community.

256. For the purpose of this study, the term "welfare" will basically mean the economic and social well-being of the community.

257. Any lawful limitation or restriction in favour of the whole community—consequently, the protection of the public interest—should be above the individual interest; the measure of the public interest should define the extent of the restriction of freedom, so that the legality of the restriction should be limited by the importance of the interest of the community.

258. Limitations or restrictions imposed on the basis of promoting the "general welfare in a democratic society",[197] or protecting the "public interest", are particularly relevant to the right to own property,[198] protected by the Universal Declaration of Human Rights.

259. In some countries, the right to own property is today no longer regarded as a right conferring prerogatives but as a social function whose performance has to be subordinated to the national interest.

260. Therefore, the need to place restrictions on the exercise of that right is also recognized.

261. The needs of the community, or the "general welfare" or "public interest", may in some cases conflict with "private interests".

262. As regards the sphere of public law, where the legislature confers statutory powers on public authorities, creating rights and obligations which permit interference with individual interests, it may be said that a less vigorous support of the rights created by the statute and granted to the public authorities is given by the courts. For example, in the United Kingdom of Great Britain and Northern Ireland, in *Fairmount Investments Ltd.* v. *Secretary of State for the Environment* an order effecting slum clearance of property was quashed on technical grounds, since it was considered that a Minister's decision had been made on the basis of reliance upon an inspector's report, and that the owners of the property had not had an adequate opportunity to deal with the inspector's findings. In another case, *Laker Airways Ltd.* v. *Department of Trade*, the United Kingdom courts, by mere implication of statute, found that the discretion of the executive authority had been fettered.

263. In this respect, it could be said that in common law countries it may appear that in the sphere of private law, where the law administered is that created by the courts themselves, the public interest is seen as being served by the enforcement of the spirit of that creation. In the sphere of public law, it may appear that it is considered that the public interest is served by a restrictive interpretation of the rights and powers vested in the executive and administrative authorities.

264. In certain cases, the "general welfare" or "public interest" is not a limitation on human rights but a restriction of individual rights. The following example will make this statement clear. Article 17 of the Constitution of Greece of 1975 protects the right of property. Rights deriving therefrom, however, may not be exercised contrary to the public interest, which must be duly proved. Property may be expropriated only when and as specified by law and always following full compensation corresponding to the value of the expropriated property at the time of the court hearing on the provisional determination of compensation. As is clear from the above provision, the existence of the "public interest" is not enough to justify compulsory expropriation. The "public interest" is only one condition, which must coexist with the other basic conditions in order to warrant the legislative authorization for expropriation, which in this way is limited by the requirement of proof of a concrete public objective[199] and in any case subject to full compensation. Accordingly, if property is compulsorily expropriated under such legal conditions, the scope of judicial review is limited. The substantive grounds on which a law which provides for compulsory expropriation can be challenged in the Council of State are the following: first, if the expropriation provided by the law is not really made in the public interests; secondly, if the law does not provide for compensation and does not specify the principles on which and the manner in which the compensation is to be determined and granted; and thirdly, if the expropriated land is not used for the purpose for which it has been expropriated within a reasonable period of time.

265. The expression "solely for the purpose"[200] limits the rights and powers of the legislative and administrative authority in placing limitations and restrictions on human rights other than those expressly covered by the relevant provisions of the Universal Declaration, the International Covenants and the national legislation.

266. Among measures for land reform, reference should be made to the above-mentioned legal institution of expropriation, which, in almost all countries and particularly in the less developed countries, is an administrative and judicial procedure that is carried out in the public interest, in circumstances determined by the law, and that provides for fair compensation to be fixed by agreement between the parties concerned, or by a judge in case of legal dispute.

267. In the opinion of the Special Rapporteur, where purely property rights are involved, the conflict between such rights and the "general welfare" could well be resolved in the community's interest, provided that all other relevant conditions have been met—that the limitation of "general welfare" is provided by law, that fair compensation is given to the individual, etc.[201] This conflict could arise, for example, in cases relevant

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[197] Universal Declaration of Human Rights, art. 29, para. 2; International Covenant on Economic, Social and Cultural Rights, art. 4.

[198] Universal Declaration of Human Rights, art. 17. See also *Seminar on Human Rights in Developing Countries*, Dakar (Senegal), 8–22 February 1966 (ST/TAO/HR/25), paras. 88–105.

[199] The Constitution of Greece of 1975 states in article 17.2: "No one shall be deprived of his property except for the public benefit, which must be duly proven, when and as specified by law and always following full compensation corresponding to the value of the expropriated property at the time of the court hearing on the provisional determination of compensation . . ." (see Blaustein and Flanz, *op. cit.*, vol. VI, Greece (issued March 1976).

[200] Universal Declaration of Human Rights, art. 29, para. 1; International Covenant on Economic, Social and Cultural Rights, art. 4.

[201] See paras. 264 and 266 above.

to the preservation of the environment, land reform, the advancement of the national economy or the promotion of national development and progress.

268. It should be noted that in certain cases, such as compulsory expropriation or nationalization, it is not enough to take account only of domestic law in the matter of property rights. An international standard of reasonableness and justice, to which domestic legislation should conform, must also be applied; otherwise, an international enunciation of the right would become meaningless.

269. It must also be emphasized that in the above-mentioned cases relating to the limitations and restrictions on the right of the individual to own property, alone or in association with others, the judicial authority is considered to be the real protector of the rights of the individual.

270. Some African experts on human rights recognize the need for the imposition of restrictions even on freedom of information on the ground of "general welfare" for the purpose of national development. Thus, it was pointed out in a United Nations seminar,[202] that the fragile structure of the African nations obliged States to impose restrictions on freedom of information, and that in any case that freedom should not and could not have the same currency as it had in the highly democratized European countries.

271. It was also stated that, no matter how much such a State might wish to ensure freedom of information, it could not allow the exercise of that freedom to lead to the disintegration of the nation.

272. Some other African participants in the above-mentioned seminar stated that, while the demands of development in Africa might justify an extension of the scope of regulatory powers, the legislative authority must not be stripped of all its authority, since it maintained the closest contact with the people. Nevertheless, it was indispensable that the exercise of the State's power should be subject to permanent checks, in order to ensure respect for human rights.

273. It is a fact that a dominant theme in the life of most Black African nations since independence has been the desire to enjoy living conditions long denied to their peoples: sufficient food, clean water, roads, communication facilities, education, acceptable housing, health care and other benefits enjoyed by an economically developed society.

274. If Governments are to be able to so move their societies as to achieve the desired development, they must be free to act. In situations such as those in certain developing States determined to progress, Governments tend to be impatient and intolerant of opposition and discussion, which are seen to be divisive; and "divisiveness" detracts attention from the more demanding problems of nation-building.[203] This being so, individuals and groups objecting openly and strongly to measures designed to promote development can expect to find themselves subject to certain disabilities, even sometimes to the extent of detention and imprisonment without trial, as well as to other serious forms of punishment.

275. Thus, for the majority of African peoples the pressing need is for economic development, for which civil and political rights may be in many cases sacrificed. In this sense, some authors have written that economic and social rights may be said to take precedence, in those countries, over other kinds of rights.[204]

276. It is very difficult for Governments of African countries, and in particular of Black African countries,[205] to be openly critical of each other on account of arbitrary limitations or restrictions on human rights or violations of human rights in general. This is because Black African Governments have a strong aversion, given official expression in the Charter of the Organization of African Unity (OAU), to interference in each other's internal affairs. This attitude is the result of the following factors: first, their feeling of racial kinship; secondly, the realization that they have plenty of work to do at home, in their own countries; thirdly, their shared recognition of the need to protect their fragile national societies from any influence which could undermine the authority of those in power; fourthly, a desire to avoid giving further ammunition to external critics; and fifthly, a concern for Black African unity.

277. Further, the peoples of the African countries have set their own priorities as to the substance of arbitrary limitations or restrictions on or violation in general of human rights.

278. As the majority of the African peoples see it, the major violations of human rights on the African continent are the policies and practices of racial segregation, racial discrimination and *arpartheid*.[206]

279. In the Lagos Declaration for Action against *Apartheid*,[207] the World Conference for Action against *Apartheid* reaffirmed support for and solidarity with the oppressed peoples of southern Africa and their national liberation movements, and the commitment of the Governments and peoples of the world to take action to contribute towards the eradication of *apartheid*.

280. Further, in that Declaration the Conference asserted:

> *Apartheid*, the police of institutionalized racist domination and exploitation, imposed by a minority régime in South Africa, is a flagrant violation of the Charter of the United Nations and the Universal Declaration of Human Rights. It rests on the dispossession, plunder, exploitation and social deprivation of the African people since 1652 by colonial settlers and their descendants. It is a crime against the conscience and dignity of mankind. It has resulted in immense suffering and involved the forcible moving of millions of

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[202] See *Seminar on Human Rights in Developing Countries*, Dakar (Senegal), 8–22 February 1966 (ST/TAO/HR/25), paras. 128–149.

[203] See *Ghana Today: Self-Reliance*, booklet published by the Ghana Information Services Department (undated), p. 27.

[204] A. G. Mower, "Human rights in Black Africa: a double standard?", *Revue des droits de l'homme* (Paris), vol. IX, No. 1, 1976, pp. 44 and 45.

[205] "Black Africa" embraces roughly all the States of Africa, except the northern tier of Arab States and South Africa.

[206] With respect to the crime of *apartheid* and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, see above, introduction, paras. 74–85, and part one, para. 136.

[207] See *Report of the World Conference for Action against Apartheid, Lagos, 22–26 August 1977*, vol. I, *Report, including Lagos Declaration for Action against Apartheid* (United Nations publication, Sales No. E.77.XIV.2 and Corrigendum).

> Africans under special laws restricting their freedom of movement; and the denial of elementary human rights to the great majority of the population, as well as the violation of the inalienable right to self-determination of all of the people of South Africa. This inhuman policy has been enforced by ruthless measures of repression and has led to escalating tension and conflict. (Para. 5.)

281. In the same Declaration the Conference recalled "that the United Nations and the international community have a special responsibility towards the oppressed people of South Africa and their national liberation movement, and towards those imprisoned, restricted or exiled for their struggle against *apartheid*" (para. 11).

282. In examining the reasons why the majority of the African States and a great number of States of the third world cannot be expected to be openly critical of each other concerning arbitrary restrictions on human rights, the following should be mentioned. First of all, there is the difficulty of being sure that criticism is justified. This is partly a matter of securing reliable information concerning the human rights situation in other African States or States of the third world, which in some cases are geographically remote. Information techniques are not well developed, and it is hard for the people and leaders of one State to know what is really going on in another. How are the people in one country to know whether individuals in another are in jail for purely political reasons or on other grounds? How is it possible for the Government of a State in a geographical area where reliable information is difficult to obtain to be in a position to judge whether or not the Government of another State is justified in restricting certain rights temporarily on grounds of the "general welfare" or for other political reasons?

283. In the opinion of the Special Rapporteur, the African peoples as a whole, regardless of the vital problems they are facing[208] in the process of nation-building and economic and social development, have set high standards for themselves as far as human rights are concerned. In fact, on this point they are virtually on a plane with the democratically advanced countries. A great number of national constitutions of African States contain statements and references to rights and freedoms which are based on the most important and historic instruments on human rights, such as the Declaration of the Rights of Man and the Citizen,[209] the Universal Declaration of Human Rights,[210] and the European Convention on Human Rights.

284. African States are generally committed, in their constitutions, to the cause of human rights and freedoms, even when they are obliged for serious reasons to impose temporary limitations or restrictions on those rights and freedoms. It should also be noted that they are committed not only to human rights but to one of the institutional devices essential to the effective enjoyment of those rights: an independent judiciary.

285. In the former British colonies of West Africa, which included the Gambia, Sierra Leone, the Gold Coast and Nigeria, the British parliamentary model has served as the basis for political development. In particular, the Gold Coast experiment has important implications for all underdeveloped areas, for it is one test of the processes and prospects of parliamentary government as a means of promoting stability, development and effective social change.[211]

286. It is a fact that one of the acute problems of almost all States of the third world is that of maintaining freedom under law and, in particular, protecting general welfare, while finding a way of satisfying the legitimate demands of a population impatient to achieve the satisfaction of basic human rights.

287. Accordingly, the foremost task and challenge facing more especially the Governments and the leadership of the third world is that of achieving compromise and balance in guiding their States and peoples to relative prosperity and in successfully combating arbitrary acts, violations of human rights, violence and misery.[212]

I. Public health

288. Article 12 of the International Covenant on Economic, Social and Cultural Rights imposes on States parties to the Covenant the obligation to recognize the right of everyone to the enjoyment of the highest attaintable standard of physical and mental health.

289. The steps to be taken by the States parties to achieve the realization of this right include, among others, the improvement of all aspects of environmental and industrial hygiene and the prevention, treatment and control of epidemic, endemic, occupational and other diseases.

290. The achievement of the highest standards of health and the provision of health protection for the entire population, if possible free of charge, is one of the basic goals established by the Declaration on Social Progress and Development (art. 10 (*d*)).

291. The meaning of the term "health" for the purpose of the present study is the same as that laid down in the preamble of the Constitution of the World Health Organization (WHO), which defines "health" as "a state of complete physical, mental and social

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[208] In examining the political, economic, social and human rights problems of African countries, it should not be forgotten that a great number of them have gained their independence since 1945. See A. P. Sereni, "Les nouveaux Etats et le droit international", *Revue générale de droit international public* (Paris), 1968, No. 2, pp. 305–322; also H. Bokor-Szegö, *New States and International Law* (Budapest, Akadémiai Kiadó, 1970), p. 52.

[209] See, for example, the Constitution of Dahomey of 1964, in I. Brownlie, ed., *Basic Documents on Human Rights* (Oxford, Clarendon Press, 1971), pp. 68–70). See also the comments of the Government of Senegal in para. 96 above.

[210] See for example the Constitution of Nigeria of 1963, in particular chapter III, "Fundamental rights", in Brownlie, *op. cit.*, pp. 56–67.

[211] D. E. Apter, *Ghana in Transition*, 2nd rev. ed. (Princeton, N.J., Princeton University Press, 1972), p. 20.

[212] See, for example, *Seminar on Special Problems relating to Human Rights in Developing Countries*, Nicosia, Cyprus, 26 June–9 July 1969 (ST/TAO/HR/36), p. 7. In connection with human rights and the economic and social problems and realities of the third world, see H. Gros Espiell, "The evolving concept of human rights: Western, socialist and third world approaches", and T. C. van Boven, "United Nations policies and strategies: global perspectives", in B. G. Ramacharan, ed., *Human Rights: Thirty Years after the Universal Declaration* (The Hague, Martinus Nijhoff, 1979), pp. 41–65 and 83–92, respectively.

well-being and not merely the absence of disease or infirmity". This broad concept covers the realm of social medicine and such specific fields as those of mental health, education, nutrition, housing, maternal and child health and welfare.

292. The right to the enjoyment of health is a component of the right to personal security, one of the absolute rights of the individual.

293. "Health laws" are mainly laws prescribing sanitary measures and designed to promote or preserve the health of the community.

294. "Public health" means the health of the community at large. According to *Black's Law Dictionary*, "the 'public health', as one of the objects of the police power of the State, means the prevailingly healthful or sanitary condition of the general body of people or the community in mass, and the absence of any general or widespread disease or cause or mortality. The wholesome sanitary condition of the community at large."[213]

295. In order to achieve the objective of protection of the health of everyone, through the above-mentioned steps taken by States, limitations are recognized by the International Covenant on Civil and Political Rights and the relevant regulations of WHO[214] on certain human rights. In particular, freedom of movement, freedom to manifest one's religion or beliefs, freedom of expression, the right to peaceful assembly and freedom of association may be subject to limitation or restriction on grounds of "public health".[215]

296. A great number of national constitutions contain provisions expressly relating to limitations on the individual's rights on grounds of health.[216]

297. It should also be mentioned that the International Labour Organisation (ILO), in its efforts to secure fuller protection for migrant workers, has adopted a number of conclusions and recommendations relating to the protection of the health of migrant workers.[217]

J. Democratic society

298. The term "democracy" has a long history and has been applied with some consistency to a form of government in which the "*demos*", the people, rule, i.e. in which the political power is held by the many rather than by the one or the few.[218]

299. The term "democracy" has also been used to describe a particular distribution of power within the community.

300. However, the term "democracy" has become so soiled by use that its employment in any delicate conceptual case carries certain risks. The term has a thriving life in the world of practice as well as in the world of theory. For generations, men have struggled to create it, wars have been fought in its name, it is brought up in justification of many different political systems and of quite opposite policies.

301. How can democracy be identified? Democracy exists where sovereignty belongs to all free men without any discrimination.

302. Democratic government means the rule of the majority in the interests of all. Such a government has to establish equal opportunities for majority and minority groups[219] where they exist.

303. Consequently, there is no democracy when a minority dominates a majority of men deprived of freedom.[220]

304. The first type of democracy, the oldest and the best, is characterized by equality founded on law.[221]

305. Traditionally, a distinction has been made between three types of situation: monopoly, oligopoly, and equality. The identification of democracy with political equality has prompted an extended use of the term "democratic" to cover any application of the principle of equality.

306. With regard to the meaning attached to the phrase "rule of the people",[222] the following might be the requirements which need to be satisfied for popular rule:

(*a*) That all should govern, in the sense that all should be involved in legislating, in deciding on general policy, in applying laws and in governmental administration;

(*b*) That all should be directly or indirectly involved in crucial decision-making, that is to say, in deciding on general laws and matters of general policy;

(*c*) That rulers should be accountable to the ruled; they should, in other words, be obliged to justify their actions to the ruled and be removable by the ruled by the procedures provided by the national constitution;

(*d*) That rulers should be accountable to the representatives of the ruled;

(*e*) That rulers should be chosen by the representatives of the ruled;

(*f*) That rulers should act only in the interest of the ruled, without any discrimination.

307. Axiomatically, no system which debars the mass of non-rulers from playing any part in the process of decision-making can be deemed democratic, and no "definition" of democracy that excludes such a role is tenable.

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[213] *Black's Law Dictionary*, 5th ed., p. 649.

[214] See the comments of WHO in para. 97 above.

[215] International Covenant on Civil and Political Rights, art. 12, para. 3; art. 18, para. 3; art. 19, para. 3 (*b*); and arts. 21 and 22.

[216] For example, the tenth preambular paragraph of the Constitution of Madagascar states: "All persons have the right freely to circulate and reside in the territory of the State, limited only by legal stipulations relating to health and the public order." (Constitution of the Malagasy Republic of 29 April 1959, as amended in 1960, 1962, 1970 and 1971 and by the Constitutional Law of 1972. Peaslee, *op. cit.*, revised 4th ed., vol. I (1974), p. 444.)

[217] *Migrant Workers* (Geneva, International Labour Office, 1973), International Labour Conference, fifty-ninth session, Report VII (2), proposed conclusions 41–43, p. 91.

[218] See part one, para. 297 and footnote 211.

[219] See the statements made at the 90th and 91st meetings of the Third Committee by Mr. Ramírez Moreno (Colombia) and Mr. Modzelewski (Poland) respectively. *Official Records of the General Assembly, Third Session, Part I, Third Committee*, pp. 44 and 46.

[220] Democracy is a state where the free men and the poor, being the majority, are invested with the power of the State. See Aristotle, *Politics*, Book VI, Loeb Classical Library, vol. XXI (London, Heinemann, 1972).

[221] Rich and poor possess the same degree of sovereignty. It is democracy *par excellence* because it gives to all an equal voice in the power of the city. Aristotle, *op. cit.*

[222] See para. 298 above.

308. At least three basic criteria can be isolated by which the degree of democracy in any community may be tested: first, the extent to which all constituent groups are incorporated in the decision-making processes; secondly, the extent to which governmental decisions are subject to popular control; thirdly, the degree to which ordinary citizens are involved in public administration, the extent that is, of the experience of ruling and being ruled.[223]

309. One defence of democracy and of any form of representative government has been that it is a means of safeguarding the freedom of subjects, of protecting them against arbitrary constraints on their actions. A system of popular elections and representative bodies will effectively be secure against governmental tyranny and oppression. The counter to oppressive government is to make the process of governing difficult, and the task of the "popular" elements in a constitution is to act as a restraint on government.

310. The term "society" used in the Universal Declaration of Human Rights and the International Covenants in a wider sense should denote the community, the public or the people in general.

311. The term "democractic" means of or pertaining to democracy. Democracy denotes that form of government in which the sovereign power resides and is exercised by the whole body of free citizens.

312. In the course of the debates on article 27 of the draft Declaration (article 29 of the Declaration as adopted), René Cassin stated, in connection with the concept "democratic society", that he did not think that the article occupied the place in the Declaration which its importance deserved; for it set the problem of human rights in the framework of international democratic society. While the word "democratic" appeared only once in the body of the Declaration—a fact which some had criticized—it would, nevertheless, have had its full value if article 27, in which it appeared, had been placed immediately after the preamble, thus giving its real meaning to a declaration which proposed, while recognizing the predominance of law over arbitrary action, to affirm that law could have no other source than the will of the people.[224]

313. In the contemporary world community there are liberal democracies[225] or Western democracies[226] and peoples' democracies or socialist democracies.[227]

314. Regardless of how democracies may call themselves—direct, representative, Western, liberal, socialist, organic, bourgeois or popular—they are only real and pure democracies when they guarantee and respect human rights and fundamental freedoms, including in particular the right of everyone to participate in political life at the local and national level by means of free elections, enabling each people to choose freely and periodically its own government, and recognizing the activities of pluralist political institutions.

K. Prohibition of the abuse of any right

315. Another general limitation imposed by law on the individual's rights and freedoms is that of the prohibition of the abuse of any right.

316. The prohibition of the abuse of any right is protected by and based on article 29, paragraph 3, of the Universal Declaration of Human Rights, which provides: "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

317. Every legal right of the individual is by definition an interest which in greater or lesser degree has the protection of law. The protection is in the first instance against the violation of the rights of the individual by other individuals. The right to life, liberty and security of person,[228] the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment,[229] freedom of thought, conscience and religion,[230] the right to freedom of expression,[231] the right of peaceful assembly,[232] and the right to freedom of association with others,[233] for example, are all rights the complete protection and the secure enjoyment of which depend on other individuals being effectively restrained by law from violating them.

318. Accordingly, it is in a complex network of provisions of the constitution and of civil, criminal and administrative law that what are conceived of as the human rights and fundamental freedoms of the individual find their basic guarantees in relation to other members of the community.[234]

319. Also, since one man's right or freedom used to excess may mean the destruction or impairment of that of others, these provisions seek to find a just balance between man and man and to draw a line between an individual's use and abuse of his rights and freedoms. Such, for example, is obviously the case in the provisions of the laws of many countries concerning defamation, nuisance, negligence, public meetings and processions in public places.

320. According to the dominant legal opinion, the abuse of any right is considered illegal.

321. The prohibition of the abuse of any right or freedom is a general principle of law valid not only in private law but also in public law. For example, the Greek Civil Code, in order to ensure the prevalence of substantial justice in civil cases, includes, in article 281, the following express provision: "The exercise of a right is prohibited, if such exercise obviously exceeds

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[223] J. Lively, *Democracy* (Oxford, Blackwell, 1975), p. 51.

[224] See the statement made by Mr. R. Cassin (France) at the 92nd meeting of the Third Committee. *Official Records of the General Assembly, Third Session, Part I, Third Committee*, p. 62.

[225] See the comments of the Government of Senegal, in para. 96 above.

[226] The concept "Western democracy" denotes the existing representative systems of the Anglo-American type.

[227] See the comments of the Government of the Union of Soviet Socialist Republics, in para. 96 above.

[228] Universal Declaration of Human Rights, art. 3; International Covenant on Civil and Political Rights, arts. 6 and 9.

[229] Universal Declaration of Human Rights, art. 5; International Covenant on Civil and Political Rights, art. 7.

[230] Universal Declaration of Human Rights, art. 18; International Covenant on Civil and Political Rights, art. 18.

[231] Universal Declaration of Human Rights, art. 19; International Covenant on Civil and Political Rights, art. 19.

[232] Universal Declaration of Human Rights, art. 20; International Covenant on Civil and Political Rights, art. 21.

[233] Universal Declaration of Human Rights, art. 20; International Covenant on Civil and Political Rights, art. 22.

[234] See paras. 197–204 above.

the limits imposed by good faith or by morals or by the social and economic purpose of the right."

322. Abuse of a right is considered to be the use of the right so as to seek a change in its purpose, a change which will be evidenced by opposite aims to those aimed at by the right. An example will make this clear. If someone attends an assembly organized legally by other persons, he exercises his right of assembly. But when someone attends a peaceful assembly in order to disrupt it, and goes to the assembly in order to transgress the right of assembly of other individuals, he does not make use of his right of assembly but abuses it.

323. A public meeting which develops into a riot should be dispersed by the police on the grounds of public order, public safety or the abuse of the rights of the participants. The community interest, or general welfare, in preventing riots and violence necessarily takes precedence over the right of assembly or freedom of movement.

324. As the State is not permitted to abuse its power, so an individual is not entitled to abuse his freedom.

325. An abusive use of a human right is considered to be its use contrary to the spirit and scope of the right.

326. Two centuries ago, in 1789, the French Declaration of the Rights and Duties of Man and of the Citizen, had already set forth the liberty to hold opinions, subject to the reservation that the citizen is responsible for abuse of his liberty. Article 11 of that Declaration reads:

> The unrestrained communication of thoughts or opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he be responsible for the abuse of this liberty, in the cases determined by law.

327. Thus, the abuse of liberty is mentioned in that provision, which lays the foundation of the right to freedom of opinion and expression and at the same time limits it by referring to the principle of the rule of law. Other national constitutions[235] provide for strict sanctions, such as forefeiture of the abused right, in the event of abuse of individual rights.

328. Examples of the abuse of rights are provided by certain news media which, invoking the freedom of the press, do not refrain from publishing pure rumour. Yet the main purpose of the freedom of the press and freedom of opinion and expression is not to spread false news but to enlighten public opinion and to provide useful information.

329. Limitation of abusive exercise of human rights is of great importance for the right of everyone to freedom of association with others, including the right to form and to join trade unions for the protection of his interests,[236] and especially for the right of everyone to participate in labour struggles, that is to say, in strikes. Abusive exercise of this right would occur if a political strike, or any other labour struggle, was engaged in for any other purpose than to safeguard or improve working and economic conditions. On that point, the Supreme Court of Greece has declared that workers have the right to strike in order to protect and improve their economic and professional interests[237] but that this right is subject to the restrictions laid down in article 281 of the Greek Civil Code. In other words, the right to strike must not be exercised in a manner that is obviously contrary to good faith (*bona fides*) or morals or exceeds the economic and social scope of the right; otherwise, exercise of the right is prohibited and the absence of the worker from his work is an arbitrary act.

330. Even though it may be argued that the right to work and to free choice of employment includes the right not to work, nevertheless an individual who refuses to work although able to do so would be abusing the right because through his inertia he would be placing a burden on society as a whole.

331. The meaning of "abuse" of a human right or freedom is often wider than is suggested in the preceding paragraphs. It is noteworthy, however, that the principle of prohibition of abuse is itself subject to abuse, particularly by certain public authorities.

332. In the opinion of the Special Rapporteur, the term "abuse of a right" means, basically, exercise of a human right or freedom for reasons, or for the achievement of objectives, not conforming to the *ratio legis* of the relevant right or freedom.

333. On the basis of this meaning, an abuse of a right or freedom should be subject to judicial control and considered as a basic limitation of human rights and freedoms.

L. The scope and purpose of article 30 of the Universal Declaration of Human Rights and article 5, paragraph 1, of the International Covenants on Human Rights

334. Article 30 of the Universal Declaration of Human Rights and article 5, paragraph 1, of both International Covenants provide that:

> Nothing in this Declaration [in the present Covenant] may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein [or at their limitation to a greater extent than is provided for in the present Covenant].[238]

335. This fundamental provision is designed to safeguard the rights protected by the Universal Declaration and secured by the International Covenants, by protecting the free operation of democractic institutions.

336. The scope and purpose of this provision are to limit the rights guaranteed only to the extent that such limitation is necessary to prevent their total subversion, and must be narrowly interpreted in relation to this object.

337. Provisions based on the same spirit and idea as the above-mentioned articles are to be found in some old and important national constitutions.

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[235] See, for example, *Basic Law for the Federal Republic of Germany*, promulgated by the Parliamentary Council on 23 May 1949, as amended up to and including 31 August 1974 (Wiesbaden, Wiesbadener Graphische Betriebe, 1974), art. 18.

[236] International Covenant on Civil and Political Rights, art. 22.

[237] Universal Declaration of Human Rights, art. 23; International Covenant on Economic, Social and Cultural Rights, arts. 6 and 7.

[238] The text in brackets is that of article 5, paragraph 1, of the International Covenants. With respect to that paragraph, see also paras. 9 and 10 above.

338. Thus, the aim of the Weimar Constitution of Germany of 1919 was to establish a pure democracy with extensive freedom of political expression. Sheltered by the provisions of this Constitution, the extremist parties in Germany in the interwar years were able to engage in violent agitation against the existing republican and democratic constitutional system. During those years, the German courts were often very lenient, especially in their reactions to acts of violence and to anti-democratic inflammatory agitation directed against the republic by right-wing extremist groups. In particular, the National Socialists were allowed to engage in quite unrestrained agitation, which was finally instrumental in bringing about the downfall of the democratic régime in Germany.

339. The Basic Law of the Federal Republic of Germany[239] of 1949 reflects that experience and contains provisions in articles 18 and 21.2 which are directly aimed at preventing the possibility of the use of constitutional provisions relating to freedom of expression of opinion, in particular, freedom of the press, freedom of teaching, freedom of assembly, freedom of association, privacy of posts and telecommunications, property, or the right of asylum,[240] to combat the basic free democratic order and to destroy the fundamental rights and freedoms of the citizen guaranteed by the Constitution.

340. Article 17 of the European Convention on Human Rights is based mainly on article 30 of the Universal Declaration.[241]

341. In order to clarify further the scope and purpose of article 30 of the Universal Declaration and article 5, paragraph 1 of the International Covenants, the following two important cases based on the corresponding article 17 of the European Convention on Human Rights may be mentioned.

342. The Irish Government invoked article 17 in the different context of the Lawless case,[242] maintaining that activities of the Irish Republican Army (IRA), in which G. R. Lawless was said to be engaged, were aimed at the destruction of Convention rights and freedoms.

343. The European Court of Human Rights adopted the criterion that Convention rights are overridden by article 17 only in so far as they are being specifically exercised or relied on to further the prohibited purpose. The Court expressly limited its observations to the application of article 17 to individuals or groups, no doubt because only the activities of individuals or groups were before it in the Lawless case.

344. The main observation to be made in relation to that case is that the claim for a fair hearing was not in itself a claim to use a right provided for by the European Convention with the object of undermining the human rights affirmed by that Convention. In other words, as the Court said, "in the present instance G. R. Lawless has not relied on the Convention in order to justify or perform acts contrary to the rights and freedoms recognized therein but has complained of having been deprived of the guarantees granted in Articles 5 and 6 of the Convention".[243]

345. In the *De Becker* v. *Belgium* case, the issue was whether the extensive deprivation of rights which resulted from the applicant's conviction was compatible with the European Convention.[244] The European Commission held that article 17 was not applicable in that particular case. In its opinion, the scope of article 17 was limited and applied only to persons who threatened the democratic system of the contracting parties, and even then it applied only to an extent strictly proportionate to the seriousness and duration of such threat. In this case, the Commission seems to go too far in its limitation of the scope of the article. However, there did not, in any case, seem to be any reason to believe that De Becker intended to abuse the freedom of expression he was claiming in order to undermine the rights and freedoms which the European Convention recognizes, and this must be decisive.

346. The reference to "any State" in article 30 of the Universal Declaration and article 5, paragraph 1, of the International Covenants should be emphasized, because it points up the fact that those articles contain two distinct prohibitions: first, that no individual or group may use the provisions of the Universal Declaration or of the International Covenants as a shield for activities which will undermine the rights recognized in those instruments; and, second, that the State may not use the articles as a means to limit or restrict rights and freedoms to an extent greater than that allowed by the Universal Declaration and the International Covenants.

347. The second prohibition occurs in the following manner. The final clauses of the above-mentioned articles are so worded as to describe action by the State rather than activities of individuals or groups, so that, in so far as the State is concerned, the articles may be read as providing that nothing in the Declaration or in the Covenants may be interpreted as implying a right of the State to perform any act aimed at limiting the individual's rights and freedoms to a greater extent than is provided for in article 29, paragraph 1, of the Universal Declaration and the relevant articles of the International Covenants.

348. Further, since the words "Nothing in this Declaration" or "Nothing in the present Covenant" must extend to article 30 of the Universal Declaration or article 5, paragraph 1, of the International Covenants themselves, it follows that the State, in counteracting the activities of those who are exercising the rights affirmed in the Universal Declaration and guaranteed under the International Covenants in order to undermine it, may not exceed those limitations.

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[239] See the comments of the Government of the Federal Republic of Germany, in para. 96 above.

[240] See, in particular, article 18, "Forfeiture of basic rights", of the Basic Law of the Federal Republic of Germany.

[241] In this connection, see the relevant decisions of the European Commission on Human Rights, in F. G. Jacobs, *The European Commission on Human Rights* (Oxford, Clarendon Press, 1975), pp. 210–214. See also the comments of the Council of Europe, in para. 98 above.

[242] *European Court of Human Rights, "Lawless" Case (Merits), Judgment of 1st July 1961 (Publications of the European Court of Human Rights, Series A: Judgments and Decisions, 1960–61).*

[243] *Ibid.*, pp. 45–46.

[244] *European Court of Human Rights, "De Becker" Case (Publications of the European Court of Human Rights, Series B: Pleadings, Oral Arguments and Documents, 1962)*, pp. 137–138.

349. Thus, in one sense, article 30 of the Universal Declaration and article 5, paragraph 1, of the International Covenants are of somewhat limited scope; they apply only to groups or persons who aim at the destruction of any of the rights or freedoms recognized by the Universal Declaration and the International Covenants and then only to the extent strictly provided by those instruments.

350. Accordingly, article 30 of the Universal Declaration and article 5, paragraph 1, of the International Covenants cannot be used to deprive an individual of his rights and freedoms permanently merely because at some given moment he performed an act or engaged in an activity aimed at the destruction of any of the rights or freedoms recognized by the Universal Declaration or the International Covenants.

351. It might also be said that under these two articles only those rights or freedoms affirmed by the Universal Declaration and guaranteed by the International Covenants which are being exercised for the prohibited purpose of undermining those instruments may be limited or restricted; that any limitations or restrictions by the State must at least be such as are necessary in a democratic society; and that, in so far as they are necessary, even to the point of deprivation, the individuals or groups engaged in the prohibited purpose cannot claim that they are a breach of the Universal Declaration or the International Covenants.[245]

M. Abuse of limitations or restrictions

352. The provisions of article 29, paragraphs 2 and 3, of the Universal Declaration of Human Rights and of the relevant articles of the International Covenants restrict the rights and powers of the State in order to ensure that limitations or restrictions on the exercise of rights are not used for improper purposes.

353. In this connection, it should be stated that national institutions and the Human Rights Committee established by the International Covenant on Civil and Political Rights have *ex officio* the power and obligation to examine whether limitations or restrictions provided for by national law, the Universal Declaration or the International Covenants have been used for improper purposes, even if not expressly invoked by the individuals whose rights or freedoms were limited or restricted.

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[245] In connection with the interpretation of article 5, paragraph 1, of the International Covenants, see the general observations of the Special Rapporteur, paras. 8–10 above.

Chapter III

BASIC PRINCIPLES GOVERNING LIMITATIONS OR RESTRICTIONS ON INDIVIDUAL RIGHTS OR FREEDOMS

354. The Special Rapporteur considers that the principles set out below should govern every limitation or restriction of or interference in the exercise of the rights or freedoms of the individual.

A. The principle of legality

355. The principle of legality presumes the obligation of all those holding State authority to administer justice in accordance with law (*secundum legem*). In other words, the principle of legality excludes any action *contra legem* or *praeter legem*. It recognizes strictly the respect of law and applies to all State activities in a State governed by law (*Etat de droit*).[246] A judge, in exercising constitutional jurisdiction, should be obliged to examine the legality (legitimacy) of a law vis-à-vis some higher instrument, i.e. a constitution or an international convention.

B. The principle of the rule of law

356. The fundamental principle of the rule of law, which is also called the principle of legality within the narrow meaning of the term, goes even further, requiring legislative authorization for any action, i.e. it forbids any action which is not sanctioned by law (*sine lege*).

357. According to *Black's Law Dictionary*, the rule of law is "a legal principle of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. Called a 'rule', because in doubtful or unforeseen cases it is a guide or norm for their decision".[247]

358. It should be emphasized once again that the rule of law is not a legal rule for a statement of principle. Nevertheless, this fundamental principle, the rule of law, should govern every limitation or restriction of or interference of any kind in the exercise of the rights and freedoms of the individual.

C. The principle of respect for the dignity of the individual

359. The most important principle, of which indirect mention is made in article 29, paragraph 3, and article 30 of the Universal Declaration of Human Rights and the relevant articles of the International Covenants on Human Rights is the principle of respect for the dignity of the individual.

360. The preamble of the Universal Declaration begins with the words: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

361. Thus, the dignity of the individual is the first principle recognized in the Universal Declaration.

362. In the opinion of the Special Rapporteur, individual dignity cannot be measured by any single factor. It is the combination of all aspects—moral, economic, social, political, etc.—of life. Democracy starts with the basic tenet that every human being is a moral entity, and therefore confers upon him both the freedom to develop his personality and the responsibility for doing so.

D. The principle that human rights and freedoms are absolute and that limitations or restrictions are exceptions

363. This principle is fundamental to the protection of the rights and freedoms of the individual. Consequently, a restrictive interpretation should apply to provisions of national or international law setting forth limitations or restrictions on the exercise of certain rights of the individual

E. The principles of equality and non-discrimination

364. The Charter of the United Nations,[248] the Universal Declaration of Human Rights, the International Covenants on Human Rights, the United Nations Declaration and the International Covenant on the Elimination of All Forms of Racial Discrimination, the

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[246] According to the ancient Greek philosopher and poet Pindar, "law prevails over all". See also M. Stassinopoulos, *Dioikitikon Dikaion* (Administrative Law) (Athens, 1957), p. 51.

[247] *Black's Law Dictionary*, 5th ed (St. Paul, Minn., West Publishing Co., 1979), p. 1196. In connection with the judicial application of the rule of law, see, among others, the judgement in *R. J. Maharaj* v. *The Attorney General of Trinidad and Tobago* (judgment delivered by the Judicial Committee of the Privy Council on 27 February 1978), in International Commission of Jurists, *The Review*, No. 21 (December 1978), pp. 61, 62.

[248] The second paragraph of the Preamble to the Charter reads:

> "[WE THE PEOPLES OF THE UNITED NATIONS, DETERMINED]
>
> ". . .
>
> "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,"

and paragraph 3 of Article 1 reads:

> "[The Purposes of the United Nations are:]
>
> ". . .
>
> "3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;".

International Covenant on the Suppression and Punishment of the Crime of *Apartheid*, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) of ILO, the Convention against Descrimination in Education of UNESCO, the Equal Remuneration Convention, 1951 (No. 100) of ILO, and the Declaration on the Elimination of Discrimination against Women[249] are among the basic instruments adopted by the United Nations and specialized agencies which expressly provide for equality and the prevention of discrimination.

365. Also, almost all contemporary national constitutions contain provisions based on the principles of equality and non-discrimination.

366. It is worth recalling that the principle of equality has prevailed for thousands of years. Thus the great Athenian statesman and lawgiver Solon said: "Better is the life where justice and equality are granted to all."[250]

367. A constitutional provision referring to the principle of equality is not a mere guideline or recommendation but a strict and fundamental provision which imposes on the judiciary the obligation to find out if the legislative, executive and administrative authorities have respected the equality of all individuals, and, in cases of violation of this principle, to order that the laws, acts, ministerial decisions or administrative regulations involved should not be imposed.

368. Nevertheless, there are cases in which States are obliged to adopt laws or take administrative measures which differentiate between individuals but which cannot be said to be discriminatory—for example, national tax legislation, which must necessarily differentiate between taxpayers according to their capital or income.

369. The question is, where is the dividing line between permissible differentiation in legislation and other administrative measures and violation of the principles of equality and non-discrimination expressly laid down in the above-mentioned international instruments, particularly in articles 1, 2 and 7 of the Universal Declaration,[251] article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights and article 2, paragraph 1, and articles 3, 24 and 26 of the International Covenant on Civil and Political Rights?

370. The question of permissible and non-permissible discrimination[252] became a burning issue in the Belgian linguistic case between a number of French-speaking Belgians and the Belgian Government. The case concerned alleged discrimination, in Belgian school legislation, against children of French-speaking families[253] and was examined first by the European Commission of Human Rights and then by the European Court of Human Rights between the years 1962 and 1968. The report of the European Commission on Human Rights on this interesting case was adopted with some important dissenting opinions in 1965. The majority of the Commission upheld the applicants' contention that article 14 of the European Convention, read in conjunction with article 2 of its Protocol No. 1 on the right to education,[254] had been violated. Finally, the European Commission itself referred the case to the European Court of Human Rights, which gave its judgement in 1968.[255] The following is one of the most interesting points of that Court's reasoning relating to the concept of discrimination.

> . . . the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The Court thus adopted the thesis that differential treatment is justified if it has an objective aim, derived from the public interest, and if the measures of differentiation do not exceed a reasonable relation to that aim.[256]

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[249] Adopted by the General Assembly on 7 November 1967 (resolution 2263 (XXII)).

[250] See Diogenes Laertius, Book II. As regards the conception of justice of the Greek philosophers, see, among others, P. Modinos, *Introduction à l'étude des droits de l'homme* (Strasbourg, 1963), pp. 3 ff.

[251] For the discussion on the formulation of the non-discrimination provision in article 2 of the Universal Declaration of Human Rights, see *Official Records of the General Assembly, Third Session, Part I, Plenary Meetings*, 180th–183rd meetings.

[252] In this connection, see M.-A. Eissen, " 'L'autonomie' de l'article 14 de la Convention européenne des droits de l'homme dans la jurisprudence de la Commission", in *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), pp. 122–145.

[253] The Belgian legislation was based on the so-called territorial principle, whereby the country was divided into a Dutch unilingual region (Flanders) and a French unilingual region (Wallonia). There was a special arrangement for Brussels, which has a "mixed" régime, and in a small area in the east, German was the predominant language. In the Dutch unilingual region, instruction in the public schools was given only in Dutch. It was possible to open private schools where teaching was in French, but they were generally not subsidized by the Government. Also, school-leaving certificates awarded by schools which did not come under the normal public schools system were not recognized, so that pupils were then obliged to pass a special examination—in the language of their choice—to obtain the necessary certification. Certain exceptions were made: in six communes on the outskirts of Brussels it was possible to obtain government subsidies and the right to hold examinations for private schools where teaching was given in French, despite the fact that these communes were in the Dutch language area. Nevertheless, the legal conditions for recognizing French as a language of instruction in this otherwise Dutch unilingual area were, in the opinion of the applicants, unreasonable. The family concerned was required to live in one of the communes which enjoyed this special status with regard to French; the everyday language of the family had to be French; and the request for instruction in French had to be lodged by a minimum of 40 heads of family. Families living close to one of the communes enjoying special status did not have the right to send their children to French-language schools there, even if the schools had room for more pupils. Their failure to satisfy the legal requirements as to residence was decisive.

[254] For the text of the European Convention on Human Rights and its five Protocols, see Council of Europe, *European Convention on Human Rights: Collected Texts* (Strasbourg, 1978), pp. 101–136.

[255] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits), Judgment of 23rd July 1968 (Publications of the European Court of Human Rights, Series A: Judgments and Decisions, 1968).*

[256] In connection with article 14 of the European Convention, see, among others, Jacobs, *op. cit.*, pp. 190–193.

371. In the discussion in the Third Committee of the General Assembly of the final version of the provision relating to equality before the law,[257] it was made clear that the provision was intended to ensure equality,[258] not identity, of treatment and would not preclude reasonable differentiations between individuals or groups of individuals.[259]

372. It should be noted that the principle of the prohibition of discrimination, contained, in particular in article 26 of the International Covenant on Civil and Political Rights, guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[260]

373. Attainment of the goal of equal rights in the administration of justice requires not only recognition of the civil and political rights of the individual, but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of human potential and human dignity.[261]

374. Application of the principle of non-discrimination has to be considered in the light of the provisions contained in other articles of the International Covenant. Thus, distinction and discrimination between nationals and aliens may be permitted in specific conditions,[262] for instance, where certain legal provisions do not apply to non-nationals or where special measures relating to national security apply.

375. In the opinion of the Special Rapporteur, the principle of equality, in the sense both of equality before the law and of equal protection by the law, should generally be regarded as a basic prerequisite for the protection of human rights.

F. The principles of *nullum crimen, nulla poena sine lege* and non-retroactivity of criminal law

376. The basic principle that no one shall be punished for anything that did not constitute a penal offence, under national or international law, at the time it was committed is contained in article 11, paragraph 2, of the Universal Declaration of Human Rights and article 15 of the International Covenant on Civil and Political Rights.

377. Article 15 of the International Covenant on Civil and Political Rights reproduces article 11, paragraph 2, of the Universal Declaration exactly, except that the word "criminal" is substituted for the word "penal", a change that was made in the early stages of the drafting of the article of the Covenant. The reason for the change was that the majority of the members of the Commission on Human Rights considered that the concept of penal offence was too narrow and that article 11, paragraph 2, could be read as meaning that the principle of non-retroactivity would cover any offence which was not defined as a crime with a prescribed penalty,[263] and that, in particular, doubt might be cast on the validity of the judgement in the Nuremburg trial of major war criminals.[264] The expression "criminal offence" was considered to be wider, embracing not only penal offences in the strict sense but any evil act worthy of punishment, and to be particularly apt in a context which covered both national and international law, the prescription of penalties being hardly developed under the latter. Some other members of the Commission on Human Rights opposed this change as abandonment of the principle *nulla poena sine lege*, which is also in article 15 of the Covenant.

378. Paragraph 2 of article 15 of the International Covenant on Civil and Political Rights was intended to confirm that the text of the first paragraph did not affect laws enacted in the very exceptional circumstances prevailing at the end of the Second World War to deal with war crimes, treason and collaboration with the "enemy", and did not aim at any legal or moral condemnation of those laws.

379. The principle of *nullum crimen sine lege* requires that an offence be defined and commonly known as such.

380. Any individual who commits an act which the law declares to be punishable or which is deserving of

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[257] Article 26 of the International Covenant on Civil and Political Rights.

[258] During the course of the elaboration of article 7 of the Universal Declaration, Mr. Pavlov (USSR) stated that the first sentence, regarding quality before the law, was intended to prevent unfair action by the courts (*Official Records of the General Assembly, Third Session, Part I, Third Committee*, 115th meeting).

[259] *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (Part II), document A/2929, chap. VI, para. 179.

[260] There was some discussion in the Third Committee at the ninth session of the General Assembly concerning the necessity and desirability of including a clause on non-discrimination in the article that became article 26 of the International Covenant on Civil and Political Rights. At the tenth session the view was expressed that it would be adequate if the article simply contained a provision relating to equality before the law, since article 2 of the Covenant already provided that the rights recognized in the Covenant should be accorded to all without distinction of any kind. On the other hand, it was maintained that freedom from discrimination should be established in the Covenant as a right and not merely as a general principle governing the enjoyment of the rights recognized in the Covenant. It was not enough to affirm that all were equal before the law; the article should also lay down a definite principle that there should be no discrimination on any ground such as race, colour, sex, etc. Against this view it was contended that the best-intentioned Government might find it difficult to agree to extend the principle of non-discrimination to all rights and freedoms. A general clause on non-discrimination might also cover discrimination in private or social relationship, which might not fall within the realm of law. States would find it difficult to accept a provision which would impose unduly vague and unlimited obligations upon them. (*Ibid.*, para. 180.)

[261] In relation to the important problem of eliminating all forms of discrimination in the administration of justice, see the "Principles on equality in the administration of justice" adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its twenty-third session (1970), which appeared as annex III to the *Study of Equality in the Administration of Justice*, by M. A. Abu Rannat, Special Rapporteur of the Sub-Commission (United Nations publication, Sales No. E.71.XIV.3).

[262] See, for example, article 1, paragraph 3, of the International Convention on the Elimination of All Forms of Racial Discrimination. See also *International Provisions Protecting the Human Rights of Non-citizens*, study prepared by the Baroness Elles, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (United Nations publication, Sales No. E.80.XIV.2).

[263] In this connection, see K. J. Partsch, *Die Rechte und Freiheiten der europäischen Menschenrechtskonvention* (Berlin, Duncker and Humblot, 1966), pp. 171–173.

[264] See above, introduction, para. 52, footnote 28, and part one, paras. 133–135 and 138.

penalty according to the basic conceptions of penal law and sound popular feeling should be punished. If there is no penal law directly covering an act, it should be punished under the law of which the fundamental conception applies most nearly to the act.[265]

381. The expresson "national law" contained in the above-mentioned articles should be interpreted to mean the law found applicable to the offence under conflict rules[266] and therefore not limited to the law of a State party.

382. The reference to "international law" in article 11, paragraph 2, of the Universal Declaration and in article 15, paragraph 1, of the International Covenant on Civil and Political Rights is intended to ensure that no one shall escape punishment for a criminal offence under international law by pleading that his act was legal under his own national law.

383. Article 15, paragraph 2, provides for an exception to article 15, paragraph 1, and is meant to make it possible to apply retroactive provisions not only to major war crimes but also to other major crimes, e.g., treason.[267]

384. It should also be noted that the general principles of law recognized by the community of nations, invoked in article 15, paragraph 2, are to be distinguished from international law, reference to which is made in article 15, paragraph 1 in particular by the fact that paragraph 2 contemplates rules of national law which are common to many countries but which may or may not be recognized as rules of international law.[268]

G. The principle of a fair and public hearing in judicial proceedings and the principle *non bis in idem*

385. Article 10 of the Universal Declaration and article 14 of the International Covenant on Civil and Political Rights provide that all persons shall be equal before the courts, and that in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

386. This principle protects not only the individual but also the general welfare, because the public has a general interest in keeping itself informed regarding the justice administered in its name.

387. The principle of a fair hearing in the determination of civil rights and obligations and criminal charges is no less vital than that of the control of powers of detention.[269]

388. Article 14, paragraph 7, also incorporates the basic principle *non bis in idem* ("not twice for the same"), i.e., that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the applicable law and penal procedure.

389. In the Special Rapporteur's opinion, the importance of this principle imposes on the court or on the international organ concerned the duty to examine *ex officio* questions relating to the principle, in cases where the convicted individual has not invoked the relevant provisions of the national law, if they exist, or of article 14, paragraph 7, of the International Covenant on Civil and Political Rights.

H. The principle of proportionality

390. A basic criterion for evaluating the legitimacy and legality of a limitation derived from article 29, paragraph 2, of the Universal Declaration or the relevant provisions of certain articles of the International Covenants on Human Rights is the principle of pro-

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[265] The following basic observations were made by the Permanent Court of International Justice in relation to this principle, in considering an amended provision of the Danzig Criminal Code:

> "It is not a question of applying the text of the law itself . . . It is a question of applying what the judge (or the Public Prosecutor) believes to be in accordance with the fundamental idea of the law, and what the judge . . . believes to be condemned by sound popular feeling. . . . there is the possibility under the new decrees that a man may find himself placed or trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and by the judge. Accordingly, a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone replaces a system in which this knowledge was equally open to both the judge and the accused.
>
> "Nor should it be overlooked that an individual opinion as to what was the intention which underlay a law, or an individual opinion as to what is condemned by sound popular feeling, will vary from man to man. . . .
>
> "It is true that a criminal law does not always regulate all details. By employing a system of general definition, it sometimes leaves the judge not only to interpret it, but also to determine how to apply it. The question as to the point beyond which this method comes in conflict with the principle that fundamental rights may not be restricted except by law may not be easy to solve. But there are some cases in which the discretionary power left to the judge is too wide to allow of any doubt but that it exceeds these limits."

(*Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, advisory opinion of December 4th, 1935, P.C.I.J., Series A/B, No. 65*, pp. 52–53, 56.)

[266] See the interpretation of article 7 of the European Convention on Human Rights in J. E. S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford, Clarendon Press, 1969), p. 183.

[267] With regard to article 7, paragraph 2, of the European Convention, the Federal Republic of Germany has made the following reservation: The Federal Republic will only apply article 7.2 within the limits of article 103 (2) of the Federal Constitution. This provides that "An act can be punished only if it was an offence against the law before the act was committed."

With regard to the non-applicability of statutory limitations to war crimes and crimes against humanity, see the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which was adopted by the General Assembly, on 26 November 1968 (resolution 2391 (XXIII)) and entered into force on 11 November 1970.

[268] The expression "general principles of law recognized by the community of nations" is the equivalent of the provision contained in article 38, paragraph 1*c*, of the Statute of the International Court of Justice, which reads: "the general principles of law recognized by civilized nations". In this connection, it should be observed that in current United Nations instruments the words "civilized nations" have, rightly, been replaced by the words "the community of nations".

[269] In this connection, the following was stated by a Chief of Justice of Canada: "The principle that no one should be condemned or deprived of his rights without being heard, and above all without having received notice that his rights would be at stake, is of a universal equity. . . . Nothing less would be necessary than an express declaration of the legislature to put aside this requirement, which applies to all courts and to all bodies called upon to render a decision that might have the effect of annulling a right possessed by an individual." *Alliance des Professeurs Catholiques de Montreal* v. *Labour Relations Board of Quebec, Dominion Law Reports* (Canada), 1953, 161, 174.

portionality. This principle implies that the extent of any limitation should be strictly proportionate to the need or the higher interest protected by the limitation.

391. The principle of proportionality is of great importance, especially in connection with the freedom of an accused individual. Thus, no infringement of the individual's physical or mental integrity should exceed the seriousness of the crime of which he is accused.

I. The principle of acquired (vested) rights

392. The principle that acquired (vested) rights should be protected must also be taken into consideration in imposing legitimate limitations on the exercise of certain human rights.

393. An acquired right is always the direct result of objective factors and can arise only from the explicit provisions of positive law.[270]

J. Other basic principles implicit in article 29, paragraph 3, and article 30 of the Universal Declaration of Human Rights and the corresponding articles of the International Covenants on Human Rights

394. Besides the principles referred to in sections A to G above, the following principles should, in the opinion of the Special Rapporteur, govern, or be taken into consideration in connection with, the imposition of limitations or restrictions on certain rights and freedoms of the individual:

(*a*) The principle of good faith;

(*b*) The principle of respect for the acquired rights of the individual;

(*c*) The principle of equity;

(*d*) The principle of self-determination;

(*e*) The principle of social solidarity, i.e., assistance by economically more advanced States or individuals to economically or socially weaker States or individuals;

(*f*) The principle of friendly relations among peoples and States;[271] and

(*g*) The principle of the maintenance of world peace.

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[270] A. G. Toth, *Legal Protection of Individuals in the European Communities*, vol. I, *The Individual and Communtiy Law* (Amsterdam, North-Holland Publishing Co., 1978), p. 90.

[271] In this connection, see the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (resolution 2625 (XVV)).

Chapter IV

GUARANTEES FOR THE PROTECTION OF THE RIGHTS OF THE INDIVIDUAL AGAINST UNLAWFUL, ARBITRARY OR DISCRIMINATORY LIMITATIONS OR RESTRICTIONS

A. General observations

395. The present ever-growing concern for effective protection of the freedom of the individual is a universal phenomenon.

396. Protection of the individual in a State whose legal and political systems are based on the principles of individual freedom and democracy is, in the present era, inconceivable without protection of human rights and fundamental freedoms. These rights and freedoms are recognized in the Universal Declaration of Human Rights the International Covenants on Human Rights, other international instruments and national constitutions as deriving from the inherent dignity of the human person.

397. The theoretical basis of human rights and their guarantees lies in the balance that must be struck between the concept of the dignity of the human person,[272] as supreme, and the interests of the community.

398. In order to draw conclusions regarding the protection of the freedom of the individual and the general welfare of the community in modern times, the foundations of the concept of the freedom of the individual and the origin of the concepts of freedom and human rights under law in a democratic community will be reviewed.

B. Origin of the concepts of freedom[273] and human rights

1. The Greeks and "natural law"[274]

399. The concept of "natural law" appears to have been born of the distinction made by the Sophists between *physis* (nature) and *logos* (divine law), on the one hand, and *nomos* (law) as applied to the human life of the *polis*, on the other. "Divine law" was eternal and wise; *nomos*, being man-made, was arbitrary.

400. During the transition from *polis* to *cosmopolis*, in the *Laws*, Plato subordinates law to community interest rather than to any abstract higher morality. Aristotle, in his *Politics*, asserts that laws ought to be rational and accord with the *politeia* (Community-State).[275]

401. Citizens of certain Greek city-states enjoyed such rights as *isonomia* (equality before the law), *isotimia* (equal respect for all) and *isogoria* (equal freedom of speech).[276] These are prominent among the rights claimed in the modern world.

402. In the Hellenistic period the Stoic philosophers formulated the doctrine of natural rights as something which belonged to all men at all times: the rights were not particular privileges of citizens of particular cities, but something to which every human being everywhere was entitled by virtue of being human and rational.

403. The Stoics were interested in the cosmos. They believed in the universal brotherhood of man and they related what they considered to be the "innate reason" of man to the cosmic order.

2. The Romans and "jus gentium"

404. Roman lawyers followed the Stoics closely in stressing the fundamental resemblance and equality of men stemming from their common possession of reason and from their capacity to develop and to attain virtue notwithstanding differences in learning and ability. Certain Rome jurists argued that no man is free unless he has a share of political authority.

405. In particular, Cicero has been credited with translating Stoic philosophical ideas into Latin legal terms. The Hellenstic idea of "natural law" was linked up with the "law of the people", and as a result *jus naturale* became more practical and *jus gentium* more general.

406. Cicero insists that the State must preserve "*jus*", i.e., right and law, and that such preservation could be expected from the "*justicia*", i.e., due process of law. The influence of "natural law" was also to be found in the *Institutes*, the famous work of the Emperor Justinian. Justice is defined as "the constant and perpetual desire of giving to every man what is due to him" and jurisprudence as "the knowledge of things divine and human, and the exact discernment of what is just and unjust".[277]

3. The church and medieval ideas

407. With the disintegration of Greco-Roman so-

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[272] See chap. III above, paras. 359–362.

[273] The word Epictetus uses is "eleutheria", which means to go where one wills. Epictetus, *Moral Discourses*, Book IV, chap. I.

[274] See above, introduction, paras. 1–23.

[275] C. Morris, *Western Political Thought*, vol. I, *Plato to Augustine* (New York, Basic Books, 1967), pp. 39 and 111–112.

[276] See Daes, "Restrictions and limitations on human rights", *loc. cit.*, p. 81.

[277] L. C. McDonald, *Western Political Theory: From Its Origins to the Present* (New York, Harcourt, Brace and World, 1968), part I, p. 111.

ciety, the Christian church alone had the power and the organization to take over.

408. St. Augustine, who lived and worked in the fifth century, wrote that "true justice" cannot exist in a pagan State.[278] Also, he replaced "*justicia*" by "*concordia*", which could parallel the modern distinction between legal and moral rights.

409. In the Middle Ages, St. Thomas Aquinas, among others, reaffirmed the central idea of the Stoics, the idea of a law superior to the external authority of the State. The State, according to St. Thomas Aquinas, is subject to that higher law which determines the relationship of the individual to the State. The justification of the State is in its service to the individual; all political authority is derived from the people, and laws must be made by the people or their representatives. An edict which contravenes "natural law" can be disobeyed, for "unjust laws have no moral validity"; liberty was regarded more as a feature of justly ordered society than as an inalienable right of the individual.

410. In fact, the view that the ruler is under the supremacy of the law is one of the principal features of the political theory of the Middle Ages.[279]

411. Later, the same doctrines were repeated, even more emphatically and in almost modern terminology. Thus, Suarez gave true expression to the sentiment of his time when he wrote "*lex injusta non est lex*" (an unjust law is not a law).[280]

4. FROM THE RENAISSANCE TO THE FRENCH REVOLUTION

412. The sixteenth and seventeenth centuries were marked by the presence and the works of important political thinkers and lawyers, such as Jean Bodin in France, Hugo Grotius in Holland, and Hooker, Hobbes and Locke in England.

413. The political thought of Bodin is reflected in his theory of sovereignty. According to him, in a democracy there is always chronic disorder and therefore there is less real liberty, which he calls "true popular liberty".[281]

414. Hooker argues that positive laws that are contrary to "divine" or "natural" law may be disobeyed. Society, government and law all rest on and imply consent.[282]

415. The great Dutch jurist Hugo Grotius concerned himself more with international law. But even so, his conception of the "State" and "law" constitutes a distinct contribution to the political thought of his time. He is categorical that positive law is subordinate to "natural law".

416. Hobbes, in his classic work *Leviathan*, said: "Liberty and necessity are consistent".

417. Another idea of Hobbes was that the sovereign is to satisfy the needs of his subject and that he is to confine his attention to their outward behaviour and not to try to judge their private thoughts.

418. In the period of the Reformation in England, matters of religion were the first subject with regard to which the Revolutionary Army of 1648 set a definite limit to the sovereignty of Parliament: "We do not empower our representatives to continue in force, or make any laws, oaths, covenants, whereby to compel by penalties or otherwise any person to anything in or about matters of faith, religion or God's worship".[283]

419. Also, in accordance with the theory of the social contract, which originated in the Middle Ages and remained predominant up to the beginning of the eighteenth century, there are limits to the power of the State.

420. The very notion of a social contract implies the existence of rights which the individual possesses before entering organized society. Most of the supporters of the doctrine of the social contract taught that there are insurmountable limits to the power of the State, not only on account of the terms of the contract but for the simple reason that some rights, because of the nature of man, are inalienable.

421. The Bill of Rights enacted by the English Parliament in 1689 recognized the right to trial by jury and prescribed that in all courts of law excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

422. It is useful for the conclusions emanating from the present study to refer briefly to the basic views of three great philosophers, two French and one German.

423. Montesquieu is the author of the important work *L'espirit des lois*. His doctrine of the separation of powers forms the corner-stone of the United States Constitution. He shows hope for liberty in the solution of the problem of "control of powers".

424. Rousseau is credited, among other ideas, with the conception of "popular sovereignty". In Book I of his famous work *Du contrat social* he argues that men are naturally unequal but as a result of the social contract they are made "equal by convention and legal rights".

425. He posits sovereignty in the legislative power which is reserved to the people and cannot be delegated.

426. The German philosopher Kant reaffirmed the moral liberty of man by asserting the freedom of the "good will".[284] According to him, reason demands that in order to ensure the freedom of others each individual has to impose certain restraints upon his own freedom and as a result there will be a system of laws under which the "will" of all is brought into harmony.

427. The ancient principles and the instruments mentioned above are of interest as expressions of efforts aimed at safeguarding the rights and freedoms of

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[278] J. B. Morral, *Political Thought in Medieval Times* (London, Hutchinson, 1958), p. 21.

[279] H. Lauterpacht, *International Law and Human Rights* (Hamden, Conn., Archon Books, 1968), p. 98.

[280] "Human law cannot derogate from natural law, since if it did so, it would destroy its own foundations and consequently itself." *De legibus, ac Deo legislatore*, 1612, Book II, chap. XIV.

[281] F. J. C. Hearnshaw, ed., *The Social and Political Ideas of Some Great Thinkers* (London, Dawsons, 1967), p. 51.

[282] C. Morris, *Political Thought in England: Tyndale to Hooker* (London, Oxford University Press, 1953), p. 183.

[283] From the Second Agreement of the People, 1648. See A. S. P. Woodhouse, ed., *Puritanism and Liberty; Being the Army Debates, 1647–1649* (London, Dent, 1950), p. 361.

[284] J. Bowle, *Western Political Thought: An Historical Introduction from the Origins to Rousseau* (London, Cape, 1948), p. 411.

the individual. But these principles and provisions do not possess the same interest as modern instruments as regards the constitutional guarantee of human rights, because the constitution as a fundamental law, with a special added formal legal validity, is a product of the eighteenth century.

5. The American and French Declarations

428. In Virginia, in June 1776, a Bill of Rights was adopted by a representative convention, and its first clause proclaimed "That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

429. The United States Constitution of 1789, with its amendments, defined these rights in greater detail. It specified freedom of speech and the press, the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures", and the right to the free exercise of religion.[285]

430. The Declaration of the Rights of Man and of the Citizen of 1789, issued by the Constituent Assembly in France, asserts: "Men are born and remain free and equal in respect of rights", and further: "The purpose of all political association is the preservation of the natural and inalienable rights of man. These rights are liberty, property, security and resistance to oppression." In this famous Declaration, liberty is defined as "being unrestrained in doing anything that does not injure another".

431. Accordingly, the notion of human nature as a source and standard of political rights goes back further than the end of the eighteenth century. The sovereign was subjected to the higher law, henceforth enthroned as the guarantor of the inalienable rights of man. This "higher law" embodied in the constitution was destined to acquire a degree of great respect and to be protected against arbitary change.

C. A short study of the polity and society of some Asian and African countries

1. The Indian subcontinent

432. The Aryan settlement in India dates back about 5,000 years.[286] Regardless of the other civilizations which flourished in several regions of the Indian subcontinent many centuries ago, it was the Indo-Aryan civilization which became one of the major factors of world history, at least from the sixth century B.C., and was recognized as such by other civilizations, for example those of China, Greece and Persia.[287]

433. In the constitutional system which evolved over the centuries, the role of the village community as an important organ of continuity was recognized and maintained by successive rulers in India.

434. The political unit, or social cell, in India has always been and, in spite of repeated conquests, still is the village community.[288]

435. Going back to the oldest literature of India, the *Vedas* show that national life in the earliest times on record was expressed through popular assemblies and institutions. The Samiti was the national assembly of the whole people and one of its chief functions was to elect the King. The Sabha, which was a standing body of selected persons and acted under the authority of the Samiti as the national judicature, outlived the Samiti.[289]

436. The Vedic period was followed by the republican era, which began in approximately 1000 B.C. and continued until A.D. 600. In *Aitaraya–Brahmana* (about 1000 B.C.) it is stated that the greater portion of Aryan India was under republican constitutions. Maximum safeguards for the liberty of the citizen were provided in the Constitution of *Licchavi* Republic (about 500–400 B.C.).

437. In Hindu Law, punishment of crime occupies a more prominent place than compensation for wrong. The law-givers condemned a crime not so much because it involved an infringement of private right but because it imperilled society and the tranquillity of the people at large.

438. The main conception of the State in India was not one based on *laissez-faire* or the mere maintenance of law and order, but one of direct activity to further progress.[290]

439. In early Aryan society, law was invariably looked upon as founded on the twin roots of religion and the agreement of men learned in sacred lore.

440. It seems that Emperor Aurangzeb introduced comprehensive reforms in the administration of justice. He caused a digest code of Islamic case-law to be compiled, which came to be known as *Futwa-i-Alamgiri*. It was meant to check the arbitrary dispensation of justice by the *qazis*.

441. Centuries later, when free India's republican Constitution was framed, the idea that "village republics" ought to form the basis of the Constitution was considered with favour.[291]

2. The structure of traditional African societies and polities

(a) *General view*

442. In Africa there were societies and civilization, races, tribes and cultures of different forms and varieties. It has, nevertheless, rightly been asserted that there was "the special quality of Africa" transcending such diversity, exhibited in the existence of 850 so-

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[285] Nineteenth-century amendments made slavery illegal and also stated that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude".

[286] See B. A. Saletore, *Ancient Indian Political Thought and Institutions* (Asia Publications, 1971), p. 5.

[287] K. M. Panikkar, *The State and the Citizen*, 2nd ed. (London, Asia Publishing House, 1960), p. 93.

[288] In this connection Sir Charles Metcalfe observed: "Dynasty after dynasty tumbles down, revolution succeeds revolution. Hindoo, Pathan, Mogul, Maharatha, Sikh, English are all masters in turn but the village communities remain the same". Constituent Assembly Debates, vol. VII, pp. 38–39.

[289] K. P. Jayaswal, *Hindu Polity* (Bangalore, Bangalore Print and Publishing Co., 1967) part I, pp. 14–15, 17–18, 20.

[290] Panikkar, *op. cit.*, p. 205.

[291] Constituent Assembly Debates, vol. III, pp. 521–527.

cieties and 800 languages which were until recently mostly unwritten.[292]

443. Perhaps the only institutions common to the political systems of acephalous societies are the age-sets, or age-grades, comprising individuals who occupy a particular set or grade at a specific time and perform social, political and judicial functions.[293] The racial characteristic of each tribe found expression in the local variation mainly in respect of the number of sets and their functions.

444. The "medicine man" seems to be both the spiritual and the temporal head of the tribe, but neither the extent of his authority nor his functions are precisely stated.

445. In the social and political structures of a number of minor tribes of East Africa, the power of decision-making and dispute settlement was generally vested in the elder members of the tribe.

446. For dispute settlement the normal forum appeared to be the "kinship court", over which the elders presided.

447. The Ibo of eastern Nigeria presented an excellent example of an indigenous structure of a peculiar political system. The chairmen of the "Council of Elders" were sometimes religious functionaries.[294]

448. The role of regulatory, advisory and judicial body of the village was attributed to the middle age-group, and executive functions, which included the duties of policemen, to the junior age-grades.[295]

449. It is interesting to note that, particularly in East and Central Africa, the Chiefs held meetings in their respective districts, in connection with their administrative work, which could be attended by any man, even a resident alien who did not have the right to vote.[296]

450. Political systems were diverse in character.

451. In the Fulani empire (nineteenth century) there was a regular army and, as parts of civil administration, there were also the police and prisons as well as courts of justice.[297]

452. In Ghana,[298] it was mainly the Akan people who were said to have the "archaic State system" in which the State was a social as well as a political entity.

453. The Chief's selection itself had to be approved at a meeting of village headmen, elders, commoners and the spokesman of the young men. The spokesman's position was politically important, in that public opinion and criticism of the government was expressed through him.[299]

454. There was no separate judiciary; the distinction between civil and criminal liability was not clear; the emphasis, however, was on arbitration, and the only recognized punishments were death and fine.

455. The institution of "chiefship" is of importance, because that institution was the main element in the "special quality of Africa" referred to above.

456. The progressive influence of Islam and Christianity on the old African societies should also be noted.

457. However, as President Nyerere of the United Republic of Tanzania wrote some years ago:

> Modern African socialism can draw from its traditional heritage the recognition of "society" as an extension of the basic family unit. But it can no longer confine the idea of the social family within the limits of the tribe, nor, indeed, of the nation. . . . Our recognition of the family to which we all belong must be extended yet further—beyond the tribe, the community, the nation, or even the continent—to embrace the whole of mankind.[300]

(b) *Some concise observations on law, justice and the traditional African legal system*

458. In East and West Africa, emphasis in decision-making and dispute settlement everywhere appeared to be placed on discussion and consensus, even when there were identifiable judicial organs, such as the "courts" of the chiefs. The exceptions were the Islamic *Hausa-Fulani* States, and perhaps a few other "chiefly" States, such as Baganda and Ashanti, having an institutionalized judicial organization which encouraged some form of adversarial litigation and where there was even a requirement of court fees.[301]

459. The general African pattern possibly reflected the central idea of traditional jurisprudence, which postulated litigation based more on duties than on rights.[302]

460. In almost every African society, the "court" played a conciliatory role and the "judges" considered the history of relations between the parties. Thus, in the "public interest" a civil suit was sometimes converted into a criminal case. The central figure of the judicial process was a "reasonable man"—a standard by which the conduct of the parties was judged—and it was argued that the judges were in some cases reluctant to support the party who was right in "law" but wrong in "justice".[303]

461. It was said that the Lozi and other African societies imported equity, social welfare and public policy into their application of law, and the judicial

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[292] J. Maquet, *Civilizations of Black Africa* (New York, Oxford University Press, 1972), p. 11; and S. and P. Ottenberg, *Cultures and Societies of Africa* (New York, Random House, 1960), p. 66.

[293] B. Davidson, *The Africans: An Entry to Cultural History* (Harmondsworth, England, Penguin Books, 1973), pp. 84–88.

[294] T. O. Elias, *Nigeria: The Development of its Laws and Constitution*, The British Commonwealth, the development of its laws and constitutions, vol. 14 (London, Stevens, 1967), p. 12.

[295] K. S. Carlston, *Social Theory and African Tribal Organization* (Urbana, University of Illinois Press, 1968), p. 196.

[296] Lord Hailey, *Native Administration in the British African Territories* (London, H.M. Stationery Office, 1950–51), part I, p. 15.

[297] Carlston, *op. cit.*, p. 155.

[298] In connection with the historical background of the Gold Coast, see, among others, Apter, *op. cit.*, pp. 21–39.

[299] See K. A. Busia. *The Position of Chiefs in the Modern Political Systems of Ashanti* (London, Oxford University Press, 1951), pp. 7–10.

[300] See J. Hatch, *Two African Statesmen—Kaunda of Zambia and Nyerere of Tanzania* (Chicago, Henry Regnery Co., 1976), p. 182.

[301] See J. Roscoe, *The Baganda: An Account of Their Native Customs and Beliefs* (London, Macmillan, 1911), p. 260; and R. S. Rattray, *Ashanti Law and Constitution* (Oxford, Clarendon Press, 1929).

[302] A. N. Allott, *Essays in African Law: With Special Reference to the Case of Ghana* (Westport, Conn., Greenwood Press, 1975), p. 292.

[303] See M. Gluckmann, *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester, Manchester University Press, 1955), pp. 20–22.

process was seen as an attempt to specify the legal concepts within ethical implications according to the structure of society, thus developing the law to cope with social change.[304]

462. A ruler could punish a person only after trial in court, and he himself was not above the law, although he was not tried in his own court. The presumption of innocence was recognized in criminal trials, as were other rules of evidence.

463. Among the Tiv, in particular, the parties could be allowed to carry out the decision of the *jir* (which means a court and also a case). The concept of *jir* also embodied the concept of law.[305]

464. The range of sanctions in the traditional legal system of Africa was wide and could be classified into transitory and permanent. In addition to compensation, fines and corporal punishment, temporary banishment could also be inflicted, but not imprisonment, which was almost unknown.[306] Banishment which later reappeared as "deportation" in the colonial legal system, was a grave sanction in the traditional legal system and was used for serious offences, especially if committed by habitual offenders.[307]

465. Another characteristic element of the traditional legal system of Africa was that norms of social behaviour generally constituted the law, and the breach of any norm was considered as disturbing the social equilibrium, which had to be restored through discussion, conciliation, compromise and settlement.

466. In almost all African societies, the offence of witchcraft was considered a public wrong.

467. President Kenyatta has described the proceedings taken according to customary law against a witch-doctor from the time of accusation up to public execution by burning to death. The final judgement was passed by the kinsmen of the man himself; it was some of his own near relations who had to set fire to his body after all his kinsmen had formally denounced him.[308]

468. Legislation was not a primary issue in traditional African society.[309]

(c) *The "native tribunals" and "courts"*

469. In Kenya, the Chiefs were not associated with the tribunals. The members of the tribunals were chosen for their personal qualifications and, although primarily required to administer customary law, also administered a wide range of statutory law.[310]

470. In Uganda, a hierarchy of courts with appointed personnel existed in the "kingdoms". "Native courts" originally consisted only of the "official Chiefs" but were later reorganized so that half of their members were "officials" and half "commoners", with the Chief serving as president.[311]

471. In Northern Rhodesia, Benches were constituted according to native custom, and the Chiefs held courts with the help of two assessors selected by them.

472. Later, in Nigeria a different process was followed on the basis of the Native Courts Ordinance, No. 8 of 1914, which was replaced by the Courts Ordinance, No. 44 of 1933. In the Northern Provinces of Nigeria, in particular, an *alkali* constituted the Native Court. Elsewhere, the court was composed of either a Head Chief of a Chief or any other person, including non-natives, or a combination of such persons, with or without assessors. Courts were graded "A" to "D", according to the power conferred on them, grade "A" courts being given full judicial power. The imposition of punishment repugnant to natural justice and humanity, and of mutilation and torture, was forbidden.[312]

473. The freedom of the individual in the social context was in general satisfactorily protected through the administration of justice by the native tribunals. Later, the colonial laws themselves authorized arbitrary executive actions.

3. THE NEW WORLD ORDER

(a) *Some general observations*

474. The industrial revolution of the late eighteenth century, followed by the technological revolution, progressively influenced the different spheres of human knowledge and understanding and established a new world order.

475. In this new world order there was not only a proliferation of social and political concepts but also a harmonious coexistence of conflicting values and views, with the growth of industrialized societies.

476. In particular, the value of international co-operation was rapidly recognized in the early nineteenth century which marked the beginning of the new world order.

477. The impact of the new world order was clearly reflected by the German philosopher Hegel in his *Fundamentals of the Philosophy of Law*, published in 1821, in which he tried to hold a precarious balance between rationalism and authoritarianism, thereby propounding what has been called constitutionalism. In 1845, Engels published *The Condition of the Working Class in England in 1844*, anticipating in form the descriptive passages of the first volume of Marx's *Das Kapital* published in 1867. The Marx-Engels theory of communism found exposition in the *Manifesto*, published in 1848 for the German members of the Communist League in London, but their theory acquired prestige through the Russian Revolution of 1917.

478. Public opinion was bound to be influenced by contemporary political thought and in turn to influence State policy.

479. The ideas of democracy and self-government acquired new meanings in England after the American War of Independence.

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[304] *Ibid.*, p. 24.

[305] Carlston, *op. cit.*, p. 22.

[306] A. Milner, "The sanctions of customary criminal law (1964–1965)", *Nigeria Law Journal*, vol. 1, pp. 173, 180.

[307] *Ibid.*, p. 173.

[308] J. Kenyatta, *Facing Mount Kenya; The Tribal Life of the Gikuyu* (London, Secker and Warburg, 1961), pp. 299–303.

[309] W. St. C. Drake, "Traditional authority and social action in former British West Africa", in P. J. M. McEwan and R. B. Sutcliffe, eds., *Modern Africa* (London, Methuen, 1965), p. 121.

[310] See, among others, Lord Hailey, *op. cit.*, part IV, pp. 146.

[311] A. N. Allott, ed., *Judicial and Legal Systems in Africa* (London, Butterworths, 1970), p. 16.

[312] See section 10 of Courts Ordinance No. 44 of 1933.

480. A number of treaties were concluded during the nineteenth century for the protection of the rights of certain groups of people. Among the most important of these were the treaties aimed at combating slavery and at the universal prohibition of the slave trade. Thus, in 1885, in the General Act of the Berlin Conference on Central Africa it was *inter alia* stated that "trading in slaves is forbidden in conformity with the principles of international law". Also, in 1889 the Brussels Conference not only condemned slavery and the slave trade but adopted measures for their suppression.[313]

481. Other important events that took place in that century were the Crimean War, which broke out in 1856, and the American Civil War, which broke out in 1861. These wars brought an immediate response from the international community in the form of the Geneva Convention of 1864 for the amelioration of the condition of the wounded in armies in the field, which was followed by other international conventions to provide for the protection of the sick and wounded in time of war and for humanitarian treatment of prisoners of war. The Hague Conventions of 1899 and 1907 dealt with the rules of war.

482. It may also be noted that President Wilson, in 1918, stressed for the first time the need for "affording mutual guarantees of political independence and territorial integrity to great and small States alike".[314]

483. After the end of the First World War, the idea of broad-based international co-operation on a larger scale prevailed in the world and resulted in the foundation of the League of Nations and the Permanent Court of International Justice.

4. SOME MODERN CONSTITUTIONS: A BRIEF GENERAL REVIEW

484. In the nineteenth and twentieth centuries, recognition of the fundamental rights of man became part of the constitutions of a great number of States, including the following: Sweden, in 1809; Spain, in 1812; Norway, in 1814; the Netherlands, in 1815; Belgium, in 1831; Denmark, in 1849; Prussia, in 1850; Switzerland, in 1848 and 1874. Also, the Constitution of Liberia of 1847 opened with a bill of rights and the French Constitution of 1848 recognized "rights and duties anterior and superior to positive laws". The United Kingdom Parliament also granted "constitutions" to the self-governing colonies of Canada in 1867 and Australia in 1900. In 1907, New Zealand was also granted a "constitution". Due to the special conditions of the socialist revolution and the construction of the new socialist social-economic system in the Soviet Union and in the people's democracies, certain peculiarities can be distinguished in the sphere and content of civic rights, and within these, of the various freedoms. In the years following the October Revolution of 1917 the working class which had come to power realized its victory primarily through political organizations and class institutions—mainly through the soviets—and controlled the government mechanism through these.[315]

485. The Union of Soviet Socialist Republics, in its Constitution of 1936, formulated the rights of its citizens. Thus, citizens of the USSR are guaranteed by the Constitution: freedom of speech; freedom of the press; freedom of assembly, including the holding of mass meetings; and freedom to hold street processions and demonstrations.

486. That Constitution was amended by the Constitution (Fundamental Law) of the Union of Soviet Socialist Republics adopted at the seventh (special) session of the Supreme Soviet of the USSR, Ninth Convocation, in October 1977. This Constitution guarantees the human rights and freedoms of every citizen of the USSR.[316]

487. The Latin American States in the nineteenth and twentieth centuries followed the general trend in their constitutions, practically without exception. They amplified the scope of fundamental rights by enlarging on the duties of the State in the social and economic fields and by adding greatly to the guarantees of their enforcement.[317]

488. Another constitution considered to be an important landmark in the protection of the individual in the second decade of this century was the Weimar Constitution of 1919, which embodied 63 articles on fundamental rights. Several of them were expressed in vague provisions, with a specific reservation expressly allowing for the possibility of making exceptions by law.

489. Some Asian States followed the same trend. For instance, the "Rights and duties of the people" were provided for in the Provisional Constitution of China in 1931.[318]

490. The "Rights and duties of the Siamese" were provided for in the Constitution of the Kingdom of Siam in 1932, and the "Rights of Afghan subjects" in the Fundamental Principles of the Government of Afghanistan in 1931.

491. The Constitution of Japan of 3 November 1946 laid down, in article 11, that "the people shall not be prevented from enjoying any of the fundamental human rights" and that "these fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights".

492. The Italian Constitution of 1947, in the "Basic Principles", provides that "the Republic recognizes and guarantees the inviolable rights of man". It states that, while "sovereignty belongs to the people", the latter must exercise it "within the limits laid down by the Constitution".

493. In the recent Constitution of Greece, which

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[313] See, among others, J. P. Humphrey, "The international law of human rights in the middle twentieth century", in R. B. Lillich and F. C. Newman, eds., *International Human Rights: Problems of Law and Policy* (Boston, Little, Brown, 1979), p. 1.

[314] *Encyclopedia Americana*, vol. 17, p. 111.

[315] I. Szabó and others, *Socialist Concept of Human Rights* (Budapest, Akadémiai Kiadó, 1966), p. 243.

[316] In this respect, see also the comments of the Governments of the Byelorussian SSR, the Ukrainian SSR and the Union of Soviet Socialist Republics, in part one, para. 64; and in para. 96 above.

[317] Among recent examples are Colombia and Ecuador.

[318] This Constitution was repeatedly amended. The most recent basic reform took place in 1978, when the Constitution of the People's Republic of China was adopted.

entered into force on 11 June 1975, article 25 provides that "the rights of man as an individual and as a member of the social entity are guaranteed by the State, and all agents of the State shall be obliged to ensure their unhindered exercise".

494. The new Constitution of Portugal lists in articles 25 to 50 the rights, freedoms and duties of the individual and their safeguards.[319] For example, article 32 provides for all safeguards in criminal proceedings, while article 50 states that "the collectivization of the principal means of production, the planning of economic development and the democratization of institutions are safeguards and conditions for the effectiveness of economic, social and cultural rights and duties".

495. Article 9, paragraph 3 of the Constitution of Spain[320] guarantees the principle of legality, the hierarchy of constitutional rules and the requirement that they be published, the non-retroactivity of punitive measures unfavourable or restrictive to individual rights, legal security and the responsibility of the public authorities, as well as protection against arbitrary action on the part of the latter.

496. Further, the constitutions of many African States[321] which have gained their independence since 1946 expressly reaffirm adherence to the principles of the Universal Declaration of Human Rights and provide for certain safeguards for human rights and fundamental freedoms.

497. Among the above-mentioned modern African constitutions is the Constitution of 1979 of the Federal Republic of Nigeria, which in chapter IV, articles 30 to 40, provides for fundamental rights for every person in Nigeria. Certain human rights, for example, the right to freedom of movement, are subject to legitimate restrictions reasonably justifiable in a democratic society (art. 38).

5. OTHER INSTITUTIONS FOR THE PROTECTION OF HUMAN RIGHTS

(a) *General view*

498. It should be emphasized that constitutional provisions recognizing the fundamental rights and freedoms of the individual are not sufficient to guarantee these rights and freedoms.

499. To be effective, these constitutional provisions must be reinforced by the necessary legislation, and the setting up of appropriate institutions[322] providing effective means of enforcement. Otherwise the constitutional provisions would remain meaningless.

500. It should also be emphasized that, in the opinion of the Special Rapporteur, legal guarantees and democratic safeguards are of capital importance in the effective protection of the human rights and fundamental freedoms of the individual.

501. It is also useful to mention that in the final analysis the protection of human rights and fundamental freedoms does not depend solely on legal provisions but on the political will of the Government and the people themselves. The people should be encouraged to participate in the law-making process of the country. The popularization of human rights is an important task.

502. People should not only be made aware of their own basic rights and freedoms but they should also respect and understand the rights of other people. In this respect, a constructive role in directing public opinion towards a better understanding of human rights and their observance could be played by education and information services and free and independent mass media.

503. The process of safeguarding human rights is never-ending.

504. It is also necessary, in examining national and local institutions for the protection of individual rights and freedoms, to consider legitimate limitations on such institutions.

505. The membership of the legislative authority should include elected persons of all disciplines to enact legislation relating to all subject matters, such as science, culture and, in particular, the protection of individual rights and freedoms. In this connection it should be made clear that, in the opinion of the special Rapporteur, persons belonging to ethnic, religious or linguistic minorities, since they form a part of the society in which they live, should be given the opportunity to take part in the political, legal, social, economical and cultural life of the country in which they live.

(b) *The independence of the courts*

506. The following concept of courts of law is used for the purpose of this study.

507. The courts are regarded as standing between the individual and the State, protecting the individual from any interference with his freedom which is not justified by law.

508. The judicial authority should be independent of the legislative and executive authorities.

509. National laws concerning the rights to equal access to the courts and to equality before the law in general should provide specifically that these rights shall be accorded to all without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

510. The independence and impartiality of members of all levels of the judiciary should be ensured by the laws and practices. The laws and related ministerial decisions should, *inter alia*, govern and provide for the training selection, jurisdiction, oath or affirmation, privileges and immunities, tenure of office, transfer, salaries and pensions of the members of the judiciary. The above-mentioned legislative and administrative provisions should also provide for limitations on judges' non-judicial activities and define the circumstances disqualifying them from acting in particular cases, the protection against improper influences accorded to them by the criminal law, and the sanctions applicable

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[319] See part one, paras. 88 and 89; see also para 120 above.

[320] See part one, paras. 91–93; see also para. 121 above.

[321] Among the most recent, see the Constitution of Algeria, adopted on 19 November 1976.

[322] See, inter alia, *Seminar on National and Local Institutions for the Promotion and Protection of Human Rights*, Geneva, 18–29 September 1978 (ST/HR/SER.A/2).

to them in the event of their failing to display independence and impartiality in performing their functions.[323]

(c) *The independence of tribunals*

511. The most important principle to be established is that tribunals should be independent of the executive. This is vital for the ordinary courts but it is even more vital for tribunals,[324] and more difficult of attainment.

512. The individual is in effect appealing against an official view. If the tribunal is to command his confidence it should be composed of men who can approach the matter from a completely independent standpoint.

513. The important point is to see that proper standards are maintained and particularly that government departments do not lay down the law to be applied by tribunals.

514. The independence of tribunals is reduced to vanishing point in cases where, as sometimes happens, an appeal from the tribunal is only to the Minister and not to the courts.

(d) *The independence of lawyers*

515. The independence of lawyers and their impartiality in making their services available to potential clients are major factors in the promotion and safeguarding of the rights of the individual.[325]

516. Like judges, lawyers should also be completely free and independent.

517. Governments, regardless of their political, legal or social system, should facilitate the role of lawyers in particular in trials of a controversial political nature.

(e) *Legal aid*

518. Free legal aid should be granted to individuals of limited means.

519. This aid could be provided by the competent government authorities, the local bar associations or other commissions established for this purpose.[326]

520. The provision of legal aid is particularly indispensable in countries where poverty and illiteracy still prevail. Legal aid should be considered not as an act of charity but as a serious commitment to political democracy.

(f) *An enlightened democracy*

521. As has been repeatedly stated in this study, every democratic community is required to give expression to the freedom of the individual in the form of concrete rights which should be protected by an adequate and effective system of law.

522. Among the best guarantees of human rights are: a representative, democratically elected parliament; free political parties; the inclusion of provisions relating to human rights and fundamental freedoms in the constitution; popularization of constitutional and other rights; public discussions; a free and independent press; fair operation of radio and television systems; and a well-informed public opinion.

523. These guarantees, among others, could constitute the main foundations for an enlightened democracy.

6. LIMITS ON THE POWERS OF THE LEGISLATIVE, EXECUTIVE AND ADMINISTRATIVE AUTHORITIES

524. Human rights and fundamental freedoms are protected at the national level by the constitutions and the laws of most of the States of the world community. But in the last resort, they depend on the way in which those constitutions and laws are administered.

525. As was mentioned above,[327] in most countries the simple answer has long been that the limitations and restrictions on the freedom of the individual should be determined or provided for by law.

526. Nevertheless, the legislative authority can sometimes threaten, restrict and annihilate the freedom of citizens. This was already understood by the people of North America when they began to form their Union of the United States.

527. The drafters of the United States Constitution, having chosen Montesquieu as their ideological guide,[328] began to think that the power of the legislative authority should be restricted in relation to the enactment of laws concerning their personal liberties.[329]

528. Thus, article 1 of the Bill of Rights provided that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances.[330]

529. Also, the Declaration of the Rights of Man and of the Citizen provided for such a general restriction. Thus article 5 of the Declaration states: "The law ought to prohibit only actions hurtful to society".

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[323] See principle 5 of the "Principles on equality in the administration of justice", in annex III to the *Study of Equality in the Administration of Justice*, prepared by M. A. Abu Rannat, Special Rapporteur (United Nations publication, Sales No. E.71.XIV.3); *Seminar on National and Local Institutions* . . . (ST/HR/SER.A/2), pp. 9 and 44; and "A preliminary study with regard to such measures as have hitherto been taken and the conditions regarded as essential to ensure and secure the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers" (E/CN.4/Sub.2/428 of 11 July 1979).

[324] In certain States, for example, the United Kingdom of Great Britain and Northern Ireland, a great divergence exists between the ordinary courts and tribunals. Tribunals are usually composed of three members, one of whom is a lawyer and the other two laymen chosen for their special experience or knowledge.

[325] *Seminar on National and Local Institutions* . . . (ST/HR/SER.A/2), p. 44; and E/CN.4/Sub.2/428 (see note 323 above).

[326] *Seminar on National and Local Institutions* . . . (ST/HR/SER.A/2), para. 88; and *Seminar on Recourse Procedures Available to Victims of Racial Discrimination and Activities to be Undertaken at the Regional Level*, Geneva, 9–20 July 1979 (ST/HR/SERA.A/3), para. 119.

[327] See paras. 4, 7 and 356–358 above.

[328] Montesquieu, *L'esprit des lois*, Book II, chap. IV.

[329] The United States Constitution was sent to the States for ratification in 1787. People soon began to notice that it did not list many of the personal liberties (individual rights). They wanted those rights written into the Constitution. In fact, a number of States, before ratification, made it known that they expected a "Bill of Rights" to be added to the Constitution. Twelve amendments, containing the rights to be held by the people of the United States, were drawn up, and of these, ten were ratified and added to the Constitution in 1791. See F. G. Cullop, *The Constitution of the United States: An Introduction* (New American Library, 1969), p. 74.

[330] See, in this connection, B. Schwartz, *The Great Rights of Mankind* (New York, Oxford University Press, 1977), pp. 54, 57 and 195–196.

530. The danger that the legislature can annihilate or restrict arbitrarily the freedom of the individual should be met by the types of measures described below.[331]

531. In the first place, any legislative limitation or restriction of fundamental human rights requires constitutional authorization. As is generally accepted, limitations and restrictions on human rights may be imposed by law only if and as long as the constitution has provided for them.

532. Secondly, the more legislative power is limited in imposing restrictions on human rights, the more this danger of annihilation of the individual's freedoms is limited. Accordingly, restrictions and limitations must be provided for by the constitutions, which must determine under what conditions, to what extent, on what grounds, for which purposes, and under what form it is permitted to interfere in or to restrict human rights. In any case, constitutional provisions authorizing limitations or restrictions on individual human rights must be drafted in very precise terms. They should be interpreted strictly and in a manner ensuring that human rights are not being interfered with otherwise than as clearly and expressly intended. Any doubt concerning the interpretation of such provisions should operate in favour of the individual.

533. Thirdly, this danger of annihilation of an individual's rights and freedoms may be met by the inclusion in the constitution of limitations and restrictions of a general nature which are imposed on the legislative power.

534. Such measures, which bind the hands of the legislative authorities in matters concerning individual rights, lead to the conclusion that laws and individual rights should be mutually restrictive. The individual, through the law, is informed of the limitations and restrictions on his rights and freedoms in each particular case. The laws which provide for limitations and restrictions on rights and freedoms must be based on constitutional authorization. Thus, any restriction of human rights requires double authorization: that is to say, the authorization of the constitution and the authorization of the law. Accordingly, a legislative authority cannot grant such an authorization in the absence of a pre-existing relevant constitutional clause.

535. Further, it is theoretically possible for a constitution to authorize directly (that is to say, without the intervention of the legislative power) the executive or the judicial power to interfere in human rights. Such direct authorization by the constitution, however, should be an exception. Some constitutions provide for other limitations and restrictions which are the legal limitations and restrictions of the freedom of the citizen. These are defined by the constitution itself and could also be called "limitations and restrictions imposed by the constitution", in contrast to those permitted by the constitution or by the constitutional authorization and which are defined by provisions of lower formal validity, especially by laws and decrees. This distinction between the limitations and restrictions imposed by the constitution and those defined by ordinary law is less clear in those cases in which the constitution refers to laws or other legal acts of a certain content, such as a restriction of a particular human right, e.g., the penal law on limitation and restriction of the right to freedom of peaceful assembly or association. In this case the limitations and restrictions are defined by ordinary law and have been recognized by the constitution, which is, as has already been mentioned, the supreme law of the State.[332]

536. On the other hand, it is possible that the limitations and restrictionss provided for by the constitution and by an ordinary law can be combined in such a way that the legislative authority can formulate a more precise definition or analysis, or even amendment, of a limitation or restriction provided for by the constitution. In such cases the legislative authority is empowered by the constitution to apply and implement a fundamental constitutional provision. Thus, interference in the rights of the individual by law or on the basis of law is permitted only as long as the constitution permits it. Limitations or restrictions on human rights should not be resorted to except for the purposes for which they have been prescribed, and they should not remain in force longer than the minimum period for which they are required.

537. The more the legislature is limited in imposing restrictions on human rights the less danger there is of the annihilation of individual freedoms.

538. The legislature is the sovereign political organ of the State and as such has the right and the obligation to control the administrative authority.

539. The legislative control of administrative authority[333] could be analysed and examined under the following subheadings: (*a*) the extent to which the legislature issues directives to the administration; (*b*) the question of delegated legislation; and (*c*) parliamentary and other commisions of inquiry.

(a) *Extent to which the legislature issues directives to the administration*

540. A general classification of legal provisions, arranged according to the extent to which they contain directives to the administration, could be made as follows: (*a*) provisions giving unlimited discretion to the administration, which is expected, but not legally bound to have recourse to judicial consideration in its exercise thereof; (*b*) provisions directing the administration to take certain matters into account when arriving at an otherwise discretionary decision; and (*c*) provisions giving a series of directions to the authorities.[334]

541. A strict and detailed statutory definition of the part to be played by the administration in the implementation of the statute is to be recognized as affording assurance *ab initio* that human rights are protected as provided for in the statute. Such a procedure will enable the individual to draw attention to the exact pro-

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[331] See also paras. 181–184 above; and *Seminar on National and Local Institutions* . . . (ST/HR/SER.A/2), paras. 20–41 and 99.

[332] See chap. II above.

[333] *1962 Seminar on Judicial and Other Remedies against the Abuse of Administrative Authority with Special Emphasis on the Role of Parliamentary Institutions*, Stockholm, Sweden, 12–25 June 1962 (ST/TAO/HR/15), paras. 15–43.

[334] For instance, provisions requiring certain conditions to be fulfilled before a passport is granted.

visions involved if he should allege violation of his rights on the part of the administration.

542. However, the disadvantage of making stringent provisions in legislation is that, as the legislator can never foresee all the possible circumstances in which the statute might need to be applied, technical and social changes may render some provisions of a law obsolete. If the legislation is too strictly drafted, the administration may either work ineffectively or simply disregard the law; and disregard of the law, even for good motives, should be discouraged.

543. Conversely, the advantage of leaving some latitude to the administration would be that unforeseen circumstances could be properly treated and that the rules applied could be altered as conditions changed, provided that the subject-matter was one to which this approach was appropriate and that other proper conditions and guarantees were respected. For instance, the *lois-cadres* (framework-laws) adopted in France and some other countries have this quality.

544. These are laws in which a framework is laid down by the legislature and the executive authority is empowered to fill in the details by means of decrees. It should be mentioned, however, that framework-laws allowing the exercise of administrative discretion have in certain cases led to the adoption of arbitary and discriminatory limitations and restrictions.

545. The limitations and restrictions imposed by the legislative authority, as mentioned above, should be only those which it has been authorized to impose by the constitution; in addition, the legislative authority should observe, *inter alia*, the following limitations on its powers: (*a*) not to impair the exercise of the fundamental rights and freedoms of the individual; and (*b*) to abstain from enacting retroactive legislation.

546. It is of great importance that framework-laws should be drafted with care and clarity as one more safeguard for an individual wishing to know and to protect his rights and as a further protection against arbitrary interpretation of the law. Experience has shown that the language used by legislators in many countries was so complicated that, even in countries where there was practically no illiteracy, people were unable to acquire a good understanding of the laws by which they had to abide. It is easier and more valuable to prevent abuse than to correct its consequences.

547. Great attention should always be paid to the procedures which the administration should feel bound to follow, or be required by statute to follow, in using powers granted by statutes or by delegated legislation enacted under statutory authorization. In this connection, it is of particular importance that no procedure should be adopted by the administration that, for example, could impose limitations or restrictions preventing an individual from being heard in any action involving his rights; on the contrary, procedures should be enacted, if they do not already exist, to recognize the following rights of the individual: (*a*) to be permitted to know the facts on the basis of which an administrative decision on his case was decided; (*b*) to attend the proceedings and to ask questions; (*c*) to require the administrative authority to state its reasons for the decision reached and, moreover, to give it in writing; and (*d*) to appeal to a higher administrative authority.

548. Further, executive and administrative authorities should be required to be consistent in their application of the law to different persons.[335] It is not enough for the executive and the administration authorities to apply the letter of the law; they should at the same time respect the letter and the spirit of the law, which should be in accordance with the Universal Declaration of Human Rights,[336] the International Covenants and other internal instruments on human rights, and the democratic constitution of the State.

549. In this connection, it should be emphatically stated that the principles of equality and non-discrimination, which are embodied in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights, the United Nations Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination, and other relevant international instruments, and in the constitutions of a great number of States, should be observed by the executive and administrative authorities.[337]

550. The principles of equality and non-discrimination circumscribe the extent to which limitations and restrictions may be imposed on the human rights and fundamental freedoms of the individual. Accordingly, no discrimination should be permitted in the content of a law or an administrative act or in their application by the executive and administrative authorities, in respect of individuals, classes of persons, minority groups or aliens, on the grounds of race, religion or sex.[338]

(b) *The question of delegated legislation*

551. In modern society, it is inevitable that the legislative authority should delegate to the executive certain powers to legislate, subject to controls. The executive authority concerns itself with so many aspects of life, many of them very technical, that the legislator could not be expected to be expert in all matters with which legislation has to deal, nor does his duty to consult his constituents permit him to be constantly in attendance at legislative sittings. In emergency situa-

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[335] Examples of legislation laying down the rules to be followed by the administration in dealing with individuals are to be found in, *inter alia*, the Austrian Act on Administrative Procedure, 1950, the Hungarian Act of 1957 and the Yugoslav Act Regulating the General Administrative Procedure, 1957.

[336] T. C. van Boven, "Partners in the promotion and protection of human rights", *Netherlands International Law Review*, vol. XXIV, No. 1/2, special issue, 1977, pp. 55 ff.

[337] In relation with the principles of equality and non-discrimination, see chap. III, sect. E, above.

[338] See *Seminar on Recourse Procedures Available to Victims of Racial Discrimination and Activities to be Undertaken at the Regional Level* (ST/HR/SER.A/3). See also the following studies prepared by special rapporteurs of the Sub-Commission: H. Santa Cruz, *Racial Discrimination* (United Nations publication, Sales No. E.76.XIV.2); F. Caporti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (United Nations publication, Sales No. E.78.XIV.1); Baroness Elles, *International Provisions Protecting the Human Rights of Non-Citizens* (United Nations publication, Sales No. E.80.XIV.2); "Study of the problem of discrimination against indigenous populations" by Mr. J. R. Martínez Cobo (final report (first part): E/CN/4/Sub.2/476 and Add.1–6; preliminary versions of other substantive chapters: E/CN.4/Sub.2/L.566, L.584, L.596 and L.622).

tions requiring speedy action it may be particularly necessary to grant the executive a wide power to adopt decrees. In many instances, therefore, all the legislature can do is to adopt a legal framework and permit the administration to fill in the details. However, this situation may create difficulties in certain countries where the constitution reserves to the legislature the right to legislate. The main problem is that of devising means whereby the legislature can control the executive in the exercise of its delegated powers. One of the ways in which this can be done is to establish standing committees or other organs composed of members of the legislature to scrutinize delegated legislation. Such organs could be empowered not only to examine the delegated legislation but to address questions to the administration, thus providing further protection of the individual's human rights against abuse of power.

552. In this connection, it is useful to mention the procedures that exist in Ireland and the United Kingdom. According to one of these procedures a provision making a subsidiary instrument subject to annulment by the legislature within a certain period is included in the parent statute. Under the other procedure the subsidiary legislation is, according to the parent statute, not to be valid unless confirmed by the legislature within a specific period. Of these two procedures, the first one is considered to be more convenient in situations calling for rapid action, while the latter procedure is considered to afford a better control by the legislature. The legislature, which is constitutionally supreme, should have the power to annul or alter the decisions of all executive organs, even the highest.

553. Further, the parent statute of delegated legislation should in any case include a limitation of time beyond which the power to legislate will no longer be vested in the administration, or a requirement that subsidiary legislation must be renewed after a certain period of time.

554. Also, it is essential to define as accurately as possible in the parent statute the scope of the delegated legislation and the policy and procedures to be followed by the executive and the administration in their use of the delegated power.[339]

555. The delegated legislation on certain subjects should be revised and consolidated at appropriate intervals, so as to make it easily intelligible to the man in the street, and not merely to experts.

556. Delegated legislation should also observe uniformity of terminology, so that the individual may be assured that the same terms always mean the same things.[340] A law that is difficult to understand is a derogation from the democratic right of the individual to know by what law he is governed.

(c) *Parliamentary and other commissions of inquiry*[341]

557. In certain States, inquiry bodies with power to require administrative officials to submit documents to them and to reply to questions posed have been set up by the legislature. The composition of these bodies varies.[342]

558. Questions put to the executive by a member of the legislature, by a specified number of members or by the legislature as a whole, should be answered within a certain time. This time-limit should be a legal requirement.

559. The control of administrative action through scrutiny by members of the legislature should be encouraged, as it affords a constant safeguard not affected to any appreciable degree by the varying extent of a separation of powers between the executive and the legislature. For example, the Civil Rights Commission which was established by the Congress of the United States of America examines complaints concerning the violation of human rights, the denial of basic rights and discriminatory actions.

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[339] In some countries, for example, Greece—the constitution explicitly exempts certain cases from being regulated through delegated legislation.

[340] See *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* [Renton Committee], Cmnd. 6053 (London, H.M. Stationery Office, 1975); and, in particular, the comments made by the Baroness Elles in the House of Lords (Great Britain, *The Parliamentary Debates (Hansard)*, fifth series, vol. 366, House of Lords Official Report, first volume of session 1975–76 (19 Nov. 1975–19 Dec. 1975), pp. 1025–1033).

[341] In connection with parliamentary and other institutions or commissions of inquiry, see in particular, *Seminar on National and Local Institutions* . . . (ST/HR/SER.A/2), para. 31.

[342] For example, in Hungary such a body would consist of members of the legislature itself; in Ireland and the United Kingdom, inquiry is held under the tribunals of inquiry and other eminent persons would be included. In Poland the members of the committees are chosen for their specialized knowledge of the work of the ministries, and the committees examine the day-to-day activities of the ministries and prepare draft legislation and departmental orders.

Chapter V

JUDICIAL AND OTHER PROCEDURES AND REMEDIES AGAINST UNLAWFUL OR ARBITRARY LIMITATIONS OR RESTRICTIONS ON INDIVIDUAL RIGHTS AND FREEDOMS

A. Procedures and remedies at the national level

1. GENERAL OBSERVATIONS

560. Owing to the increased, and still increasing, role of the State in modern times, the power exercised by the executive and administrative authorities in practice has inevitably expanded and will probably continue to do so.

561. The problem is to devise ways and means whereby this power can be adequately controlled by the judicial and legislative authorities.

562. In a great number of States, laws do a great deal to keep the balance between the individual and the State. The State is no longer considered to be a privileged legal person before the courts: it has the same duties and responsibilities as any other person.

563. In certain other States, the laws simply put the State, like individuals, under the negative duty not to injure someone without just cause or excuse.

2. JUDICIAL REVIEW

564. Judicial review is a vital and essential safeguard against the illegal exercise or abuse of power by the executive and administrative authorities. This is so because an independent judiciary is able to judge matters brought before it entirely free from political or other bias.

565. Judicial review is confined to a review as to the legality of an act or decision; it does not extend to a review of the propriety of the act or decision taken within the law. However, while the value of judicial review is generally recognized, there is great doubt about its practical availability to all citizens in all States. Protection of individual rights by the courts operates only if the individual is aware of the possibility of legal remedy and can contemplate the necessary expenditure.[343]

3. JUDICIAL AND OTHER PROCEDURAL AND REMEDIAL INSTITUTIONS

(a) *Prerogative writs:* certiorari, mandamus, *habeas corpus, prohibition and* amparo

566. A broad distinction on the question of judicial and other remedial institutions exists between the Anglo-American legal system, hereinafter referred to as the common law system,[344] and the continental legal system.[345]

567. The common law system is in essence based upon review by the courts through appropriate procedures and the continental legal system upon review mainly by administrative courts or tribunals.

568. In common law countries a great role is played by the courts in relation to what are commonly called prerogative writs of *certiorari*,[346] *mandamus*,[347] habeas corpus,[348] prohibition and *amparo*.

569. These prerogative writs are of cardinal importance for the protection of the rights and freedoms of the individual.

570. There are, however, certain technical limitations inherent in proceedings in the nature of *mandamus, certiorari* and prohibition; for example, *certiorari* does not lie to quash a purely administrative decision and in many cases there may be a very fine line between what is an administrative act and what is a judicial act. Thus, in most countries if an aggrieved person chooses the wrong remedy by taking an erroneous view of the category of the decision against which he is complaining, time and money may well be wasted.

571. Also, in most countries *mandamus* does not lie in cases where an administrative officer does not

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[343] See *1959 Seminar on Judicial and Other Remedies against the Illegal Exercise or Abuse of Administrative Authority*. Peradeniya (Kandy), Ceylon, 4–15 May 1959 (ST/TAO/HR/4), paras. 23–28.

[344] Australia, Cyprus, Hong Kong, India, Ireland, Malaysia, New Zealand, Sri Lanka, the United Kingdom of Great Britain and Northern Ireland, the United States of America and various other countries are common law countries.

[345] Austria, France, the Federal Republic of Germany, Greece, Indonesia, Iran, Italy, Senegal and various other countries appear to adhere to the continental system.

[346] *Certiorari* (to be more fully informed of) is a writ which was originally issued by the Crown in the Queen's Bench Division (United Kingdom). It is addressed to judges or officers of inferior courts, commanding them to certify or to return the records of a case pending before them, to the end that justice might be done. For further details see Earl Jowitt, *The Dictionary of English Law*, C. Walsh, ed. (London, Sweet and Maxwell, 1959), vol. I, p. 335.

[347] *Mandamus* (from Latin, meaning "we command") a prerogative order issued in certain cases to compel the performance of a duty. The order of *mandamus* was substituted for the writ of *mandamus* by the Administration of Justice (Miscellaneous Provisions) Act, 1938. For further details see Jowitt, *op. cit.*, vol. II, p. 1134.

[348] Habeas corpus, a writ so called because it is directed to a person who detains another in custody and commands him to produce or have the body of that person produced before the court for a specified purpose. This writ was formerly much used for testing the legality of imprisonment for political reasons, especially during the reigns of the Stuarts; the evasions and abuses practised by the judges (at the instance of the Crown) to detain State prisoners in prison led to the enactment of the Habeas Corpus Act, 1679. For more details on the development of this writ, see Jowitt, *op. cit.*, vol. I, pp. 886–887. See also Lord Wilberforce, *Die Bürgerlichen Grundrechte des Einzelnen* (Karlsruhe, Müller, 1966). Series of the Juristische Studiengesellschaft Karlsruhe, No. 74, pp. 6–7.

refuse to do his duty but merely delays in its performance.

572. Proceedings by way of *mandamus, certiorari* and prohibition generally have the further limitation that they place upon the litigant the burden of proving his case without enabling him to obtain discovery of documents in possession of the Government.

573. The great value of the above-mentioned prerogative writs lies in their speed.

574. In general, the judge's power to regulate procedure and to prescribe rules can guarantee the result desired.

575. The writ of *amparo* is considered to be one of the most important procedural devices, particularly in the Mexican legal system.[349]

576. Its evolution has been shaped by foreign as well as national developments, both attempting to impart to *amparo* a scheme of constitutional controls on official acts—borrowed from the United States Constitution of 1787. *Amparo*, however, has acquired its own peculiar characteristics despite these influences.

577. In addition to its original role of protecting individual guarantees and the separation of federal and state powers, social and historical events have served to broaden its protective scope. These developments have made Mexican *amparo* unique compared to other Latin American versions of *amparo*. In addition to protecting individual liberties in a manner similar to the writ of habeas corpus, the *amparo contra leyes* is a means of contesting laws and regulations of dubious constitutionality. The judicial, or "cassation", *amparo* provides the petitioner with the means to challenge the legal basis of both federal and state tribunals in a manner similar to the French remedy of cassation. Official acts of the federal, state, and local administrations which are not subject to adequate review in administrative tribunals or through ordinary non-judicial administrative remedies may be contested by way of the *amparo*. Thus, *amparo*, has acquired the role of an administrative review proceeding (*proceso contencioso-administrativo*).

578. The writ of *amparo* has evolved into a crucial instrument for the protection of collective and individual agrarian rights—the writ of *amparo* in *ejidal* and agrarian matters.

579. Thus, the Mexican writ of *amparo* is among the most comprehensive procedural instruments of our time. It constitutes the final stage in the Mexican legal process as demonstrated by the quantity and diversity of legal disputes which culminate in the federal courts as *amparo* litigation. Thus, the writ of *amparo* now serves as the guardian of the entire Mexican judicial order, from the highest constitutional precepts to the most modest ordinances of municipal government.[350]

580. Another method which exists in the common law countries is the statutory appeal to the Supreme Court from orders and decisions of administrative organs acting in a quasi-judicial capacity. Consequently, in the common law countries the main method by which effective control of unlawful or arbitrary limitations or restrictions on human rights can be achieved is by judicial control, the effectiveness of which depends on an independent judiciary.

581. Further methods which exist in common law as well as in countries with a continental legal system include: actions against the State, actions for damages or injunction against public servants, disciplinary tribunals, legislative or parliamentary supervision and control through internal and executive machinery.

(b) *Review by ordinary courts*

582. In a great number of countries, including some socialist countries—such as, for example, Bulgaria, Hungary, the Union of Soviet Socialist Republics and Yugoslavia—the ordinary courts may alter or annul an act complained of and may also order the payment of damages.

583. In other countries the ordinary courts have the power to annul decisions of the executive and administrative authorities in cases where they have exceeded their powers. They can do so upon an action for a declaration (which has been much developed in recent years), as well as by means of the ancient remedy of *certiorai*.

584. In certain countries—such as, for example, Denmark, Norway and Portugal—the ordinary courts may also declare acts or other orders of the Administration to be unconstitutional.

(c) *Review by administrative courts*

585. In France and other countries following the French example,[351] there exists a system of courts empowered to deal with disputes between individuals and the administration, which is separate from the hierarchy of ordinary courts.

586. At the head of the system of administrative courts in France stands the Conseil d'Etat (the Council of State).

587. The main functions of the Conseil d'Etat are: (*a*) on request, to advise the Government on draft laws and draft decrees and on the interpretation of existing laws; (*b*) to judge cases brought against the administration, with the exception of those coming under judicial procedure.

588. All administrative acts may be challenged before the Conseil d'Etat even those of the President of the Republic.

589. The remedies available are: (*a*) annulment of acts complained against; and (*b*) in certain cases, the granting to the victim of an indemnity, to be paid by the administration.

590. The above-mentioned power of annulment vested in the Conseil d'Etat covers illegal administrative acts and discretionary acts if the Conseil finds that these acts violate the principles of law: for example, if certain powers are not exercised for the purpose intended by the law (*détournement de pouvoir*).[352]

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[349] In connection with the origin, judicial evolution, practical operation and procedural development of the Mexican writ of *amparo* see, H. Fix Zamudio, "A brief introduction to the Mexican writ of amparo", *California Western International Law Journal*, vol. 9, No. 2 (Spring 1979), pp. 306–348.

[350] Fix Zamudio, *loc. cit.*, p. 348.

[351] Belgium, Greece, Turkey and a number of African countries.

[352] See paras. 597–600 below.

591. In some countries, where a system of administrative courts exists separately from the ordinary courts, problems of conflicts of jurisdiction arise and machinery is needed for settling them. In France, this function is performed by the Tribunal des conflits, but the question of the division of functions is not settled by legislation as it is, for example, in Belgium, where the competence of the ordinary courts and of the administrative authorities is laid down in the Constitution. In Belgium and in certain other countries conflicts of jurisdiction are settled by the Cour de cassation.

(d) *Constitutional law courts*

592. After the Second World War, constititional law courts were established in certain States, including Austria, Cyprus, the Federal Republic of Germany and Italy. These courts are, *inter alia*, entrusted with the competence to examine the constitutionality of the laws and to deal with actions related to violations of human rights and fundamental freedoms.

593. In accordance with article 93 (1) of the Basic Law of the Federal Republic of Germany, its Federal Constitutional Court shall decide:

> 1. On the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a highest federal organ or of other parties concerned who have been vested with rights of their own by this Basic Law or by rules of procedure of a highest federal organ;
>
> 2. In case of differences of opinion or doubts on the formal and material compatibility of federal law or Land law with this Basic Law, or on the compatibility of Land law with other federal law, at the request of the Federal Government, of a Land Government, or of one third of the Bundestag members;
>
> 3. In case of differences of opinion on the rights and duties of the Federation and the Länder . . .;
>
> 4. On other disputes involving public law, between the Federation and the Länder . . .;
>
> 4a. *On complaints of unconstitutionality*, which may be entered by any person who claims that one of his basic rights or one of his rights under paragraph (4) of Article 20, under Article 33, 38, 101, 103 and 104 has been violated by public authority;
>
> 4b. On complaints of unconstitutionality, entered by communes or associations of communes on the ground that their right to self-government under Article 28 has been violated by a law other than a Land law open to complaint to the respective Land constitutional court;[163]
>
> 5. In the other cases provided for in this Basic Law.

594. It is to be noted that the constitutional courts play an important role in safeguarding individual rights and freedoms in a democratic society.

(e) *Constitutional commissions*

595. In Portugal, in particular, whenever the courts refuse to apply a provision of a law, legislative order, implementing order, regional or equivalent act, on the ground that it is unconstitutional, recourse shall be available, once the ordinary remedies available have been exhausted, to the Constitutional Commission for final judgement on the case in question. Under article 282 of the Constitition of 1976, such recourse shall be free of charge, shall be compulsory in the case of the Ministério Público, and shall be limited to the question of unconstitutionality. Recourse shall also be available to the Constitutional Commission against any decision that applies a provision previously judged unconstitutional by the Commission. Such recourse shall also be free of charge and shall be compulsory in the case of the Ministério Público.

596. The powers and duties of the Constititional Commission are set forth in article 284 of the Constitution, which states that the Commission shall:

> (*a*) Give opinions on the constitutionality of acts requiring scrutiny by the Council of the Revolution;
>
> (*b*) Give opinions on whether the provisions of the Constitution have been infringed by omission;
>
> (*c*) Be competent to judge questions of unconstitutionality submitted to it in pursuance of article 282.

(f) *Special remedies against abuse or non-use of power by the executive or administrative authorities*

"*Détournement de pouvoir*"

597. The principle of "*détournement de pouvoir*", which means misuse of power, has been established to afford the individual special protection against the misuse of power by the executive. Thus, this principle is applicable if certain powers are not exercised for the purpose intended by the law. This principle has been much developed in France by the administrative courts, which insist that a public authority must genuinely exercise its powers in the public interest. The courts will therefore look at the intention which motivated an act, and if the act was done with a motive or for an end other than that for which the power was conferred, it will be annulled. For example, French administrative courts have held that the dismissal of employees by administrative authorities which is manifestly based on political motives and considerations, and has no relation to the public interest, constitutes an abuse of power. The courts have gradually enlarged the scope of *détournement de pouvoir* so as to keep pace with the needs of the time. The administrative courts of France and of other States following the French example insist on powers being exercised genuinely for the purposes conferred by parliament and not for any ulterior purpose. If powers are exercised in a way which is plainly unreasonable, then the courts will infer that there was not a genuine exercise of power. If matters are taken into consideration which ought not to have been, or if matters are not taken into account which ought to have been, the courts will again intervene.

598. It is not the use of powers, but their misuse, which the courts will intervene to prevent. When powers are entrusted by the legislature to a public authority, it is not for the courts to say how they should be exercised, as long as they are not abused.

599. An obvious example is the case of the compulsory purchase of an estate for the general welfare. Any restriction or limitation that serves the general welfare is considered to be above the individual interest. The claims of the owners of the estate compulsorily expropriated have to be subordinated to the general welfare. However, if the compulsory expropriation of the individual's property does not serve the general welfare, then the courts should annul the relevant act on which the expropriation was declared.

600. The safeguards against abuse of powers by an administrator are not to be found by requiring him to act judicially but by requiring him to apply the law

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[163] Paragraphs 4a and 4b were inserted by federal law of 29 January 1969 (*Bundesgesetzblatt*, 1969, part I, p. 97).

faithfully, to follow the prescribed code of procedure and, in general, to exercise his powers genuinely. The latter requirement of genuineness brings us back to the principle of *détournement de pouvoir*. To exercise power genuinely the administrator must have the proper state of mind, in which he carefully and justly investigates all relevant considerations and rejects all irrelevant ones. He should also balance fairly the public interest and individual rights. After due consideration of these factors, he should come to a just decision, taking care to exercise the power according to the purpose authorized by the legislature. If the courts are satisfied that he did not bring such a state of mind to bear on his decision—or that his action was so unreasonable that he cannot have brought it to bear—then the courts will interfere. If this approach is vigorously applied by the courts, the individual may find in the courts protection against abuse of power by the executive and administrative authorities and a general guarantee against undue encroachment on his fundamental freedoms and human rights.

Non-use of power

601. Sometimes an executive or administrative authority does not exercise a power which it ought to exercise; for example, a minister may delay indefinitely consideration of the appointment of a civil servant who has successfully passed the qualifying examination and who possesses all other necessary qualifications.

602. The administrative courts have laid down that the executive is under a general duty to exercise due diligence. The courts therefore will not tolerate inertia or procrastination. The administration cannot simply do nothing and escape responsibility. The principle that the duty of the administration is to act with reasonable diligence is similar to the common law principle that a power is coupled with a duty. There are many powers which are coupled with corresponding duties, and in such cases the High Court will always intervene to see that the duty is performed.

603. Civil remedies exist in some countries for failure to fulfil a duty to make reparation, but they are most inadequate. Nevertheless, the duty to make reparation exists.

604. It is not only in the interest of the individual but also in the public interest that the principle of the duty of the administration to act with reasonable diligence should be further developed and adopted by all legal systems.

(g) *Supervision by the ombudsman (parliamentary commissioner)*[354]

605. In a great number of States—Austria and Sweden, for example—an important feature of their modern administrative system is the decentralization of the administration to various agencies headed by directors-general or councils and to local governments.

606. These agencies and local governments operate independently and are subject only to the law or to formal decisions by the central Government.

607. In Sweden, for example, where this administrative system is flourishing, if an individual is dissatisfied with a decision taken by an administrative authority, his appeal will in many cases be tried not in the ministry, but by the Supreme Administrative Court (Regeringsrätten), which has the power to revise or change decisions of administrative authorities.

608. In the past, there was in general no possibility of bringing a case before the ordinary courts for review or for the purpose of having an administrative decision annulled. All the interested individual could do was to lodge a complaint with the Chancellor of Justice, who could have prosecuted the official if he had contravened the law. Now, the aggrieved individual may complain to the ombudsman.

609. The office of ombusman was established as an instrument of the Parliament for the supervision and control of the administration. The ombudsman is, both in form and in practice, independent of the Government. He is also in fact independent of Parliament in the performance of his duties; Parliament is only entitled to lay down general rules for his activities. His position as a sort of people's tribune, drawing authority from the people's elected representatives, invests him with great authority.

610. In his capacity as Commissioner of Parliament, the ombudsman supervises the observance of the law and statutes. He can intervene against all forms of illegal or improper conduct of officials. He investigates complaints against administrative decisions, as well as complaints of official misbehaviour, inefficiency or negligence.[355]

611. The ombudsman has no authority to change or annul an administrative decision. Nothing, however, prevents him from expressing an opinion on the matter. The administration is not obliged to follow his recommendations, but as a rule it has in practice shown great deference to them.

612. In addition to investigating complaints of maladministration, the ombudsman may intervene to propose to the Government the correction of an injustice, if it appears that it cannot be remedied by any legal process.

613. There are differences in the scope of the ombudsman's jurisdiction in the various Scandinavian countries. For example, in Denmark and Finland, ministers are subject to the supervisory authority of the ombudsman. The judicial authorities come under the supervision of the ombudsman in Sweden and Finland, but not in Denmark. One of the reasons given for excluding the judiciary from supervision by the ombudsman in Denmark is that such supervision may endanger the independence of the courts. In Sweden, there are two ombudsmen, one to supervise the civil administration and the judiciary and another the military authorities. The jurisdication of the ombudsman in Sweden and Denmark has in recent years been extended to include, to a limited extent, supervision of

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[354] This institution originally existed only in Sweden and other Scandinavian countries. It has in recent years been adopted by many other States as well.

[355] The Danish ombudsman's jurisdiction extends to the activities of ministers as well as others in the service of the Government. In Denmark, the ombudsman is obliged to "keep himself informed as to whether any person comprised by his jurisdiction pursues unlawful ends, takes arbitary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties".

municipal authorities. In Finland, the ombudsman has supervised these authorities for a long time.

614. With regard to forms and methods of supervision, it should be noted that the ombudsman has considerable freedom to decide on the form his activity is to take. He conducts investigations on the basis of complaints received from individuals or on his own initiative. Subject to certain limitations he has access to the documents of all authorities and may demand explanations in writing from the authorities or officials whose act or decision is questioned. All authorities are bound to afford lawful assistance to the ombudsman. If an official is guilty of abuse, error or neglect in the performance of his duties, the ombudsman may institute proceedings against him. However, in practice, prosecution is replaced in most cases by a reminder to the official concerned that his handling of the case has been faulty or improper. A substantial portion of the activities of the ombudsman is devoted to furthering the uniform interpretation of the law.

615. The ombudsman has considerable flexibility in the form of action which he can take in a given case.

616. In the opinion of the Special Rapporteur, the ombudsman is not only a dynamic instrument of parliament supervising the administration, but mainly a protector of the rights of the individual as well as of freedom of the press and mass media, freedom of assembly and freedom of speech which may be abused by those in position of power.

617. The institution of the ombudsman is based on the principle of impartial investigation by an authority entirely independent of the administration. An investigation can be started by the ombudsman, not only on complaint by an individual but also on his own initiative as a result of information he may acquire from inspections, the press, reports or other reliable sources.

(h) *Supervision by the "procurator", as in the Union of Soviet Socialist Republics*[356] *and other countries of Eastern Europe*[357]

618. The "procurator" plays an important part in the Union of Soviet Socialist Republics and other countries of Eastern Europe in ensuring the observance of legality at all levels of administration and in safeguarding the rights of the citizen.

619. The function of the procurator in those countries is to ensure that the law is respected. He is not required to investigate the propriety of actions of persons if such action is taken within the limits of the law. The procurator is neither a legislator nor a judge; nor is he empowered to annul or modify decisions of the administration.

620. The main areas of supervision by the procurator may be classified as follows:

(*a*) Supervision of the legality of acts of the administration in a broad sense, including those of authorities, executive administrative bodies of local soviets of people's deputies, enterprises and official institutions and organizations; this excludes the highest executive body as a collective institution which is responsible to the legislature, but individual ministers may be the subject of action on the part of the Procurator-General in the case, for instance, of illegal dismissal of a subordinate;

(*b*) Supervision of the legality of the work of investigating authorities;

(*c*) Supervision of the legality of imprisonments and of the observance of rules governing conditions in prisons.

621. At the head of the body of procurators stands the Procurator-General, who is appointed, and may be dismissed, by the Supreme Soviet of the USSR and is responsible and accountable to it and, between sessions of the Supreme Soviet, to the Presidum of the Supreme Soviet of the USSR.

622. In certain East European countries the legislature has the power to annul actions by the Procurator-General, but this power is rarely used.

623. The relationship between the Procurator-General and the legislature is designed to ensure that his subordinates shall be independent of the administration at all levels.

624. In some socialist countries there exists a College of Procurators or a group of deputy procurators who are appointed by the legislature or by its presidium. In the event of a disagreement between the Procurator-General of the Soviet Union and the majority of the members of his College of Procurators, the Procurator-General has the power to proceed with the implementation of his own decision but must report the disagreement to the Supreme Soviet. It is also possible for an individual member of the College of Procurators to report his own dissenting opinion on a question to the Supreme Soviet.

625. While the procurator possesses the power of independent action, much of his work arises in practice out of complaints received from individuals or from organizations, which may be conveyed to him in letters or other communications, or orally in interviews.

626. The procurator has the power to call for documents and other information from administrative authorities, as well as from private citizens involved in a breach of the law, and he may make visits to prisons and other places of detention, in order to interview prisoners, either at his own wish or at their request; he is also authorized to require prison authorities to produce the documentary basis upon which an imprisonment was made and, in general, to establish whether an act of detention is legal and whether the rules governing the conditions in prisons are being observed.

627. If, on the basis of all the information at his disposal, the procurator decides that a violation of the law has taken place, he may take one of two principal steps: he may raise the matter with the appropriate administrative authority, or he may institute an action in the civil or criminal courts.

628. The administrative authority approached by the procurator must consider the matter within a certain time.

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[356] See the Constitution of the USSR, articles 164–168. See also *Seminar on National and Local Institutions for the Promotion and Protection of Human Rights*, Geneva, 18–29 September 1978 (ST/HR/SER.A/2), paras. 61–62.

[357] Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslavakia, Hungary, Poland, Romania, and Ukrainian Soviet Socialist Republic.

629. If the administrative authority does not accept the recommendation of the procurator, he has the power to take the matter to the next higher administrative authority, and, ultimately, to the legislature itself. Not only may the procurator request that the wrong be righted and any necessary compensation given but, at the same time, he may recommend disciplinary action against the official concerned.

630. If the Procurator initiates judicial proceedings, he has the right to attend the court proceedings and to take part therein, and to offer information and recommendations as to the appropriate decision.

631. In Yugoslavia,[358] a new law has recently altered the provisions applicable to the Procurator's Office. Thus the Federal Procurator is no longer appointed by the Federal People's Assembly but by the Federal Executive Council, to which he is responsible. Hierarchical control exists among the corps of procurators throughout the State.

632. The main task of the Procurator's Office in Yugoslavia is the prosecution of criminal offences and those involving economic transgressions.

633. In administrative, civil and other proceedings, the procurator can initiate or join such proceedings as a party only if the public interest is affected, as the rights of citizens are ensured by legal remedies to which they are entitled by laws on civil procedure and the judicial control of administrative acts.

(i) *Other independent mediators*

General observations

634. It should be stressed that local practices, procedures and systems for the protection of the rights and freedoms of the individual differ from country to country with regard, in particular, to the role of independent mediators. Many developing countries lack the money and staff necessary for the effective use of certain institutions, the importance of which is nevertheless recognized. For example, most African countries, faced with the ever-pressing need to establish sound and stable institutions to combat the overriding problems of hunger, literacy, disease and the lack of economic development and to strengthen as well as maintain national independence, do not accord priority to the role of independent mediators. However, most African States have written constitutions which have incorporated in their provisions the Universal Declaration of Human Rights; they guarantee the independence of the judiciary, and a number of statutory provisions are available to safeguard individual freedoms and rights.

The Canadian Human Rights Commission

635. The Canadian Human Rights Act, which entered into force on 14 July 1977, brings the law under one single statute and entrusts its administration to a single independent body, the Canadian Human Rights Commission. The Commission is mainly responsible for the protection of human rights and fundamental freedoms. At any time after a complaint is lodged the Commission may set up a tribunal of human rights to consider it.

636. The Commission may designate a person to investigate a complaint. It is also empowered to assure remedies against acts of racial discrimination. Any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in discriminatory practice may file a complaint with the Commission. And, what is very important, the Commission may itself initiate a complaint when it has reasonable grounds for believing that a person is engaging or has engaged in discriminatory practice.

637. The above-mentioned human rights tribunal has very broad powers. For example, it may, *inter alia*, in accordance with subsection 41 (2) and (3) of the Act in question, make an order against a person found to be engaging or to have engaged in discriminatory practice to cease the said practice and to take measures to prevent the same or a similar practice occurring in the future; it may compensate the victim for the wages he was deprived of and any expenses incurred as a result of the discriminatory practice, etc.

638. Further, if the tribunal finds that a person has engaged in a discriminatory practice wilfully or recklessly, or that the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice, it may order the person to pay compensation to the victim, not exceeding five thousand dollars.[359]

The "Office Lokpal" in India

639. In parts of the third world, certain States have devised institutions similar to the ombudsman with some modifications to suit their respective needs and experiences. For example, in India, an "Office Lokpal" (Protector of the People) is being set up to inquire into allegations of misconduct against public men; it includes a member of the Council of Ministers for the Union and a member of either House of Parliament. Lokpal has an independent investigating machinery and reports to Parliament. In a number of states, offices of "Lakayuktas" (Commissioners of the People) are functioning to inquire independently into acts of corruption and other abuses of authority by public officials.[360]

(j) *Hierarchical review within the administration itself*

640. The first remedy lies in internal control within the administration. This remedy is well known in many countries, regardless of their socio-economic, political and legal systems.

641. In this connection, reference should be made to the *recours gracieux* in Belgian, French and Greek law, which is a recourse addressed to the wrongdoer himself. However, this is not a very effective remedy since the official concerned is not likely to be inclined to change his decision. More important is the recourse to the higher authority, i.e. the *recours hiérarchique*; but the higher authority may not wish to upset the

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[358] In connection with the Constitution of Yugoslavia of 1974, see D. Kulic, "The Yugoslav Federation in the 1974 Constitution", *Jahrbuch des Offentlichen Rechts der Gegenwart* (Tübingen, Mohr, 1976), New Series, vol. 25, pp. 211–219.

[359] See the fourth periodic report submitted by Canada to the Committee on the Elimination of Racial Discrimination (CERD/C/52 of 4 December 1978).

[360] *Seminar on National and Local Institutions . . .* (ST/HR/SER.A/2), para. 64.

decision of the lower authority, and may indeed have been responsible for the instructions in accordance with which the decision was made. For administrative acts of the decentralized authorities (provinces, communes, etc.) the ***autorité de tutelle*** exercises some control in Belgium; in some circumstances this protection is available to the individual in cases of *excès de pouvoir*.

642. According to article 29 of the Constitution of Cyprus, everyone may address complaints and petitions to the authorities, who must reply in writing within 30 days, otherwise recourse may be made to the administrative court. The same recourse to the administrative authorities can be made by a person dissatisfied with the result of his complaint.[361]

(k) *Review by various boards and other authorities*

643. Under this heading may be classified a number of administrative boards that exist in certain countries—Belgium, for example—for the purpose of dealing with disputes on a wide range of matters, including social insurance and payments to war victims.

644. Furthermore, in certain other countries, including the United Kingdom of Great Britain and Northern Ireland, a number of administrative tribunals have been set up under various statutes, dealing for instance with social and industrial insurance, national health services and taxation. In general there is a right of appeal, on matters of law, to the High Court.

(l) *The rule of personal responsibility*

645. In some countries—the United Kingdom, for example—all government officials and police officers are personally liable for wrongful acts; that is to say, a civil action for damages can be brought against them in the ordinary courts for any such act.

646. In the case of police officers, who are not regarded as the servants of the police authority in certain countries, the only remedy is by an action against the individual officer, but in fact the police authority stands behind the officer in the event of damages being payable in respect of acts done in the course of his police duties.

647. In the opinion of the Special Rapporteur, civil liability for infringement of the human rights of the individual may be afforded in the following three ways:

(*a*) By making only the official liable;

(*b*) By making only the State liable; or

(*c*) By making both the official and the State liable.

648. The criminal responsibility of the official is an effective indirect means of control of the administration, because a verdict of guilty might also have civil and administrative consequences and would have a deterrent effect.[362]

(m) *The rule of State responsibility*[363]

649. In addition to the rule of personal responsibility, there should exist State responsibility.

650. State liability should depend upon certain requirements, for example, upon proof of lawfulness.

651. In the opinion of the Special Rapporteur, the administration should be completely responsible for the acts of its agents. Individuals affected should be able to approach either the ordinary courts or the administrative courts, or other competent organs or authorities, in order to obtain redress for harm suffered.

652. For example, under article 172 of the Constitution of Cyprus, the liability of the Republic for damage caused by its officers or authorities is recognized, and under article 146 (6) any person who has been successful before the Supreme Constitutional Court in an administrative recourse may proceed afterwards to file a claim for damages or other relief. Both the above matters are within the competence of the ordinary courts.

B. Procedures and remedies at the regional level

1. COUNCIL OF EUROPE—CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS and FUNDAMENTAL FREEDOMS (EUROPEAN CONVENTION ON HUMAN RIGHTS)[364]

653. The Council of Europe[365] was set up in 1949 in response to the post-war demand for European unity. The fundamental aim of the Council is to achieve greater unity between its members by the conclusion of agreements and by initiating common action in all fields, except military. Respect for the rule of law and the protection of human rights are basic conditions of membership of the Council of Europe. Safeguarding the rights and freedoms of the individual is considered

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[361] For the English text of the Constitution of the Republic of Cyprus, see the White Paper on Cyprus presented to the United Kingdom Parliament in July 1960: *Cyprus*, Cmnd. 1093 (London, H.M. Stationery Office, 1960), pp. 91 ff. For further details, see the paper (WP/12) presented by Mr. M. Triantafyllides to the United Nations seminar on judicial and other remedies against the abuse of administrative authority, with special emphasis on the role of parliamentary institutions, held at Stockholm from 12 to 25 June 1962. See also E. A. Daes, "Protection of minorities under the International Bill of Human Rights and the Genocide Convention", in *Xenion: Festschrift für Pan. J. Zepos* (Athens, Ch. Katsikalis, 1973), vol. II, pp. 49–50.

[362] See *Seminar on National and Local Institutions* . . . (ST/HR/SER.A/2), para. 49.

[363] See the paper by M. Triantafyllides (WP/12) referred to in footnote 361 above, pp. 21–22.

[364] See also introduction paras. 115–122.

[365] The Council of Europe is a peaceful association of democratic States (not, be it noted, a military alliance, as is NATO) which proclaimed their faith in the rule of law and their devotion to the spiritual and moral values which are the common heritage of their peoples. This aspect of the matter was well summarized when the European Convention on Human Rights was signed at the sixth session of the Committee of Ministers in Rome on 4 November 1950. Mr. Sean McBride, the Irish Minister for External Affairs, said, *inter alia*, on that occasion:

> "The present struggle is one which is largely being fought in the minds and consciences of mankind. In this struggle, I have always felt that we lacked a clearly defined charter which set out unambiguously the rights which we democrats guarantee to our people. This Convention is a step in that direction";

and another great European, Mr. Robert Schuman, Foreign Minister of France, said:

> "This Convention which we are signing is not as full or as precise as many of us would have wished. However, we have thought it our duty to subscribe to it as it stands. It provides foundations on which to base the defence of human personality against all tyrannies and against all forms of totalitarianism."

See A. H. Robertson, *Human Rights in Europe* 2nd. ed. (Manchester, Manchester University Press, 1977), pp. 4–5.

by the organs of the Council of Europe as the prerequisite of democracy.

654. The European Convention on Human Rights entered into force on 3 September 1953 and is now binding on 20 West European States.

655. The European Convention has been seen as the first essay in giving specific legal content to human rights in an international agreement, and combining this with the establishment of machinery for supervision and enforcement.

656. The first innovation in the Convention is that the Contracting Parties undertake to secure the rights and freedoms set out therein, not only to their own nationals and the nationals of the other contracting parties but to all persons within their jurisdiction.

657. It should also be mentioned that there is a comprehensive clause against discrimination on grounds of race, colour, sex, religion, etc. The result is that the European Convention protects all persons in the European countries, regardless of their race, religion or colour; it has, for example, been applied to an Algerian in the Federal Republic of Germany.

658. The rights and freedoms safeguarded in the European Convention[366] are basically taken from the list of civil and political rights set out in the Universal Declaration.

659. The scheme of part III of the International Covenant on Civil and Political Rights and the relevant provisions thereof correspond broadly to section I and the provisions thereof of the European Convention.[367]

660. The provisions of section IV of the European Convention relate to the powers and procedures of the European Court of Human Rights. All petitions, whether by a State under article 24 of the Convention or by an individual under article 25, must first be submitted to the European Commission of Human Rights, which decides the question of "admissibility" on criteria expressly set out in articles 26 and 27. The Commission also makes investigation with the object mainly to assist the parties, as far as is practicable, to reach a friendly settlement within the framework of the European Convention and draws up a report containing a brief statement of the facts and the solution reached or, failing a friendly settlement, a statement of the facts and of the opinion of the Commission as to whether or not those facts disclose a breach of the European Convention. Only the Committee of Ministers or the Court can take a binding decision on the merits of an application.

661. The right to bring a case before the European Court of Human Rights under article 44 of the European Convention is vested only in the States parties and the European Commission, subject to the further condition that the State party concerned has accepted the compulsory jurisdiction of the European Court.

662. Since an individual cannot bring a case before the European Court and cannot *a priori* be a respondent there, an applicant under article 25 of the European Convention is not a party to the proceedings before the Court. The European Court resolved the problem of the representation of an individual applicant before it in the Lawless case.[368] While recognizing the force of the precedents invoked by the European Commission on the role of individuals before international tribunals,[369] the European Court found that none of them covered the case of an individual proceeding against his own Government, and that the solution to the problem must be looked for in the special nature of the procedure prescribed in the European Convention.

663. The European Court considered that the means it had at its disposal for this purpose were the report of the Commission and observations made to the Court, orally or in writing, by delegates of the Commission and, finally, evidence given by the applicant before the Court as a witness under rule 38 (1) of the Court's rules of procedure.

664. Thus, the enforcement provisions of the European Convention on Human Rights—which, unlike the International Covenant on Civil and Political Rights, provides a judicial forum and confers the right of "individual application", not provided for in the above-mentioned Covenant but in the Optional Protocol thereto[370]—are apparently better in securing the right to personal liberty, but it is doubtful if the European Court of Human Rights, which can, under article 50 of the European Convention, "if necessary, afford just satisfaction to the injured party", can order release from unlawful detention. Article 5 (4) of the European Convention envisages such a remedy, which, however, is apparently to be available in a national forum, in view of the provisions of article 1 of the Convention.

665. Nevertheless, the concept "just satisfaction" has still to receive careful consideration by the European Court. In any case the European Court is likely to give the "interpretation" that is most appropriate in order to realize the aim and achieve the object of the European Convention. The combined effect of articles 1 and 60 of the European Convention requires municipal law to be so construed as not to limit or to derogate from any of the rights and freedoms ensured by the Convention.[371]

666. In this respect, the courts of some European countries which are parties to the European Convention have shown a remarkable adaptability in so far as

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[366] For the text of the European Convention on Human Rights and its five Protocols, see Council of Europe, *European Convention on Human Rights: Collected Texts* (Strasbourg, 1978), pp. 101–136.

[367] Compare, for example, articles 2, 3 and 4 of the European Convention on Human Rights with articles 6, 7 and 8 of the International Covenant on Civil and Political Rights.

[368] *European Court of Human Rights, "Lawless" Case (Merits), Judgment of 1st July 1961 (Publications of the European Court of Human Rights, Series A, Judgments and Decisions 1960–61)*. See the comments of the Council of Europe in para. 98 (26)–(29), above.

[369] See *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion of July 13th, 1954; I.C.J. Reports 1954*, p. 47; and *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion of October 23rd, 1956; I.C.J. Reports 1956*, p. 77.

[370] See paras, 744–786 below.

[371] R. Pinto, "Consequences of the applications of the Convention in municipal and international law", in A. H. Robertson, ed., *op. cit.*, p. 276.

the effect of the European Convention on the national legal system is concerned.[372]

667. The enforcement of any order made by the European Court is the responsibility of the Committee of Ministers under article 54 of the European Convention.[373]

2. INDIVIDUAL RIGHTS AND REMEDIES IN EUROPEAN COMMUNITY LAW

668. The status of the individual in the substantive law of the European Communities is determined by the fact that so far as the individual is concerned, the Treaties, in particular the Treaty of the European Economic Community (hereinafter referred to as EEC), contain basically three different kinds of provisions. A first category of provisions do not go beyond the traditional concept of an international treaty obligation. They create mutual rights and obligations between the member States only. They are not directly applicable to individuals; and if they affect individuals at all they can only do so indirectly, i.e. as a result of national implementation and as national, not Community, measures. A second category of provisions are addressed to Community institutions only, requiring them to adopt implementing measures in realization of a Community objective specified in the Treaty. Individuals are affected not by the Treaty provisions themselves but by the implementing measures (the so-called secondary legislation). These measures may be of two different kinds, i.e. directly applicable and not directly applicable. The latter provisions may affect individuals only if and when further implemented by the member State to which the measure is addressed. A third category of provisions were originally addressed to and created obligations for the member States only, but were subsequently declared by the European Court of Justice (hereinafter referred to as the Court of Justice) to be of such a nature as to produce direct effects in the legal relations between the member States and individuals. These apply to individuals directly, i.e. without legislative intervention by the member States, creating for them rights enforceable in the municipal courts. Such directly applicable Community provisions have an overriding effect over conflicting national rules whether laid down in ordinary statutes or in the constitution itself.

669. The status of the individual in substantive Community law determines his position with respect to remedies.

670. The main consideration is that besides other individuals, there are two main actors on the Community scene against which the individual may wish to seek protection: the Community institutions (i.e., the Council and the Commission) and the member States.

671. Individuals have a dual system of remedies, i.e. before the Court of Justice and before national courts.

672. Of the three categories of subjects of Community law, an individual can cite before the Court of Justice only one: the Community institutions (Council and Commission). Apart from a few exceptional cases, he cannot cite member States or other individuals.

673. Actions brought against Community institutions in the Court of Justice may have the ultimate objective of compelling member States to put an end to their infringement of Community provisions.

674. The European Treaties themselves contain no explicit provisions for the protection of the basic rights of the individual as such. Only in so far as it was thought that in their normal course of business the Communities might interfere with certain basic economic and social interests of the individual, or in order to achieve a Community objective, have safeguards been built into the Treaties.[374] For example, the European Economic Community Treaty provides for a general prohibition of discrimination on grounds of nationality for the protection of industrial and commercial property; for the protection of existing systems of property ownership; for the principle of the equality of sexes (equal pay for equal work). The problem of rights first arose before the European Court in cases where German undertakings invoked the fundamental rights provisions of their national Constitution in order to evade obligations imposed by Community institutions.

675. The Court of Justice has affirmed the supremacy of Community law over national constitutions, expressly ruling out the possibility of individuals invoking national fundamental rights guarantees against the overriding effect of a Community provision.[375]

676. While the above-mentioned decision was necessary to preserve the unity and supremacy of Community law, it made apparent the existence of a gap in the system of protecting individuals.

677. The Court of Justice has taken it upon itself to fill the gap. In an earlier case and in a different context, the Court observed that the fundamental rights of the individual were enshrined in the general principles of Community law and protected by the Court of Justice.[376]

678. While reaffirming its earlier statement that respect for fundamental rights forms an integral part of the general principles of law, the Court added the new element that the protection of such rights is also inspired by the constitutional traditions common to the member States and hence it must be ensured within

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[372] For example, the United Kingdom Court of Appeal observed in 1969 in the Corocraft case that "it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it". *Corocraft, Ltd. and Another* v. *Pan American Airways, Inc.* (*The All England Law Reports*, 1969 (London, Butterworths, 1969), vol. 1, p. 87).

[373] In connection with the European Convention on Human Rights and natural persons in public law, see J. Velu, "La Convention européenne des droits de l'homme et les personnes morales de droit public", in *Miscellanea W. J. Ganshof van der Meersch* (Brussels, Bruylant, 1972), vol. I, pp. 589–617.

[374] See A. G. Toth, *Legal Protection of Individuals in the European Communities* (Amsterdam, North-Holland Publishing Co., 1978), vol. I, p. 107.

[375] See *Cour de justice des Communautés européennes, Recueil de la Jurisprudence de la Cour*, vol. XVI, 1970–9, Affaire 11–70, arrêt de la Cour du 17 décembre 1970, p. 1135. With respect to the primacy of Community law, see, in particular, Lord Mackenzie Stuart, *The European Communities and the Rule of Law*, The Hamlyn Lectures, 29th series (London, Stevens, 1977), pp. 16–18.

[376] *Cour de justice des Communautés européennes, Recueil de la Jurisprudence de la Cour*, vol. XV, 1969–5, Affaire 29–69, arrêt de la Cour du 12 novembre 1969, p. 425.

the framework of the Community's structure and objectives.

679. The rights guaranteed by Community law cannot constitute unfettered prerogatives but must be viewed in the light of the social function of the activities protected. Just as in the national legal systems basic rights are safeguarded subject to the limitations dictated by general welfare, so within the Community legal order they are subject to certain limits justified by the overall objectives pursued by the Communities provided that their substance is left untouched.

680. Accordingly, it would seem that while the legal basis for the protection of fundamental rights lies in the general principles of law and the common constitutional traditions of the member States, the particular rights themselves that are the subject of protection can be ascertained from the national constitutions and the relevant international conventions[377] or treaties ratified by all the member States.

681. The fact that the European Convention on Human Rights is binding on the European Communities has two significant consequences. The first is that any individual who feels that an act of the institutions has infringed one of the rights protected by the European Convention now has two different systems of remedies open to him: that set up by the European Convention and that created by the Community Treaties. However, the individual can avail himself of the former only after he has exhausted all domestic remedies, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.[378]

682. In this respect, the domestic remedies will be exhausted only after the Court of Justice has rendered its decision.

683. The fact that all the member States have not recognized the competence of the European Commission of Human Rights to receive individual petitions under article 25 of the European Convention[379] and have not accepted the compulsory jurisdiction of the European Court of Human Rights under article 48 of that Convention may cause difficulties.

684. The second consequence that follows from the binding nature upon the Communities of the European Convention is that the Court of Justice must regard the standards of protection laid down in the European Convention as a yardstick not only in reviewing the legality of the acts of the institutions but also in assessing the compatibility with Community law (which now includes the principles enshrined in the Convention) of the conduct of member States.

685. Accordingly, the Court of Justice may examine, in cases properly brought before it, any infringement of a fundamental right by a national authority at least to the extent to which the right alleged to have been infringed may involve a human value of an economic or social nature whose protection falls within the specific objectives and provisions of primary or secondary Community law. For example, any infringement of the limitations placed by Community law on the discretionary power of the member States to control aliens[380] on grounds of public policy under articles 2 and 3 of Directive 64/221 must be assessed in the light of the more general principle enshrined in the various provisions of the European Convention[381] that no restriction in the interests of national security or public safety shall be placed on the rights and freedoms of the individual other than such as are in accordance with the law and are necessary in a democratic society.

686. The Court of Justice has so far affirmed, explicitly or by implication, the protection within the framework of Community law of the following fundamental rights of the individual: right to equal treatment, or prohibition of discrimination on grounds of nationality or sex; right to freedom of movement for persons, services and capital; right to ownership; right freely to choose and practise a trade or profession; right to freedom of association, including the right to form and join trade unions; right to freedom of religion; right to freedom of election.

687. Thus, the Court of Justice has recognized some rules and principles which qualify as "superior rules of law designed to protect the individual" and whose violation by the institutions is capable of establishing the liability of the Communities.

688. It should, however, be made clear that as regards protection vis-à-vis member States, individuals are denied any direct redress at Community level as they cannot cite member States before the Court of Justice. They can, on the other hand, institute proceedings against the injurious measure or practice in the national courts and, in the framework of such proceedings, invoke the jurisdiction of the Court of Justice to interpret the Community provision infringed by the measure or practice.

3. PROCEDURES AND REMEDIES AVAILABLE TO INDIVIDUALS IN THE INTER-AMERICAN SYSTEM

(a) *Some preliminary observations*

689. In 1945, human rights became of inter-American concern. At the Inter-American Conference on Problems of War and Peace (the "Chapultepec Conference"), Guatemala demanded that collective non-recognition be used as a weapon against anti-democratic Governments on the ground that such régimes endangered the peace and solidarity of the hemisphere and were the primary cause of the denial of the rights of man.[382] This proposal was ultimately forgotten. Collective action against the internal régime of a fellow American State would conflict with the most fundamental principle of the Americas—the doctrine of non-intervention. Instead of the above-mentioned Guatemalan proposal, the Conference adopted a weak

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[377] Including the European Convention on Human Rights.

[378] European Convention on Human Rights, art. 26.

[379] See Council of Europe, *The Rights of the European Citizen* (Strasbourg, 1961), pp. 42–46.

[380] See Baroness Elles, *International Provisions Protecting the Human Rights of Non-Citizens* (United Nations publication, Sales No. E.80.XIV.2), pp. 13–14.

[381] Articles 8, 9, 10 and 11 of the European Convention on Human Rights and article 2 of Protocol No. 4 to the Convention.

[382] See *Inter-American Conference on Problems of War and Peace, Mexico City, February 21-March 8, 1945: Report submitted to the Governing Board of the Pan American Union by the Director-General* (Washington, D.C., Pan American Union, 1945); and Pan American Union, Handbook for Delegates to the Ninth International Conference of American States, 88–89 (1947).

resolution on "International protection of the essential rights of man".[383] It declared adherence to those international law principles for the safeguarding of essential human rights and vaguely supported a system of international protection for these rights.

690. After the above-mentioned Conference, Eduardo Rodriguez Laretta[384] called for collective intervention to assure democracy in the Americas. "Peace", he said, "is safe only where democratic principles of government prevail."[385] The Laretta Doctrine was also rejected by the majority of American Governments on the basis of a number of arguments related, in particular, to the concepts "democratic government" and "non-democratic government" and to the equation of democracy with peace.

(b) *Charter of the Organization of American States*

691. When the American States met in 1948 at Bogotá, Colombia, to reconstitute the inter-American system, they had before them the Inter-American Treaty of Reciprocal Assistance,[386] the so-called Rio Treaty, adopted in 1947. In its preamble, this Treaty affirmed, *inter alia*, "as a manifest truth . . . that peace is founded on justice and moral order and, consequently, on the . . . protection of human rights and freedoms".

692. This treaty provided no sanctions or measure of enforcement to be taken against a State violating human rights.

693. There was a strong sentiment in Bogotá for the creation of an inter-American norm for the respect and observance of human rights.

694. Power would be granted to the inter-American system to enforce the norm.[387]

695. Thus, in 1948 the loose affiliation previously carried out through the Pan American Union was transformed into the Organization of American States (OAS), whose Charter made it clear that one of the essential foundations of this regional organization was the doctrine of non-intervention.[388]

696. The OAS Charter set forth rather general and idealistic statements of human rights.

697. Thus, the preamble states that "the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man". This thought is further amplified in the statement of principles contained in article 5 of the Charter: "The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy". States supporting inter-American protection of human rights were not content with the above-mentioned statement of principles for the protection of human rights.

698. Thus, a resolution was adopted entitled "American Declaration of the Rights and Duties of Man".[389]

699. This Declaration is to be found in the Final Act of the Ninth International Conference of American States, held at Bogotá, Colombia, in 1948.

700. In the preamble of the Declaration, the American peoples have, *inter alia*, "acknowledged the dignity of the individual" and the fact that "their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man . . .".

701. Again, it was not the intention of its authors to create a legally binding bill of rights.

702. The idea of Kant and Laretta, referred to above, in relation to the parallelism between democracy and respect of human rights, on the one hand, and peace, on the other, found expression again in 1959 at the Fifth Meeting of Consultation of Ministers of Foreign Affairs, which was called to consider problems of political unrest in the Caribbean and the effective exercise of representative democracy in the hemisphere.

703. The Declaration of Santiago, Chile,[390] includes freedom of the press, radio and television and, in general, freedom of information and expression among the essential conditions for the existence of a democratic régime.

704. The American Governments were also called upon to ensure a system of freedom for the individual and social justice based on respect for human rights and to protect by effective judicial procedures those human rights contained in domestic legislation.

(c) *Inter-American Commission on Human Rights*

705. Also at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959, the issue of safeguarding human rights to protect the stability of the continent finally resulted in the creation of an Inter-American Commission on Human Rights composed of seven members, elected by the Council of the Organ-

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[383] *Inter-American Conference on Problems of War and Peace . . .* (see note 382), appendix A, resolution XL.

[384] Eduardo Rodriguez Laretta was Minister for Foreign Affairs of Uruguay at that time. He followed Kant's thesis equating international peace with a republican form of government for all States.

[385] Pan American Union, Consultation of the Government of Uruguay and Replies of the Governments on the Parallelism between Democracy and Peace, the International Rights of Man and Collective Action in Defense of Those Principles (May 1946).

[386] See *Inter-American Conference for the Maintenance of Continental Peace and Security, Rio de Janeiro, August 15-September 2, 1947: Report on the Results of the Conference, Submitted to the Governing Board of the Pan American Union by the Director-General* (Washington, D.C., Pan American Union, 1947), appendix A.

[387] See Pan American Union, Inter-American Juridical Committee Report to the Inter-American Council of Jurists concerning Resolution XXXI of the Conference of Bogotá (1949), p. 2. See also above, introduction, paras 125–126.

[388] See D.T. Fox, "Doctrinal development in the Americas: from non-intervention to collective support for human rights", *New York University Journal of international Law and Politics*, vol. 1, No. 1 (April 1968), p. 48.

[389] See above, introduction, para. 126 and note 73.

[390] See *Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12-18, 1959: Final Act*, OAS, Official Records, OEA/Ser.C/II.5 (Washington, D.C., Pan American Union, 1960), resolution I.

ization.[391] The aims of the Inter-American Commission were to promote respect for human rights by preparing studies and recommendations on progressive measures in favour of human rights, and also to serve OAS as an advisory body.[392] Nothing was said of the protection of human rights and, moreover, the important power to consider petitions from individuals and organizations failed to gain the approval of the Council of the OAS.[393] The Inter-American Commission was established as "an autonomous entity of the Organization of American States".

706. In 1967, the Protocol of Buenos Aires amended the Charter of OAS and established the Inter-American Commission on Human Rights as the consultative organ of OAS on human rights. The basic function of the organ was declared to be to promote the observance and protection of human rights.[394]

(d) *American Convention on Human Rights*

707. The American Convention on Human Rights[395] recognizes the above-mentioned Inter-American Commission on Human Rights as one of the organs—the other being the Inter-American Court of Human Rights—with competence relating to fulfilment of the obligations made under the Convention.

708. The membership of the Inter-American Commission on Human Rights continues to be seven, as provided in article 34 of the American Convention on Human Rights. However, the members are to be elected in a personal capacity by the General Assembly of OAS from a list of candidates proposed by member States.

709. Among the main functions and powers of the Inter-American Commission are "to take action on petitions and other communications pursuant to its authority, under the provisions of Articles 44 through 51" of the Convention; and "to submit an annual report to the General Assembly of the Organization of American States" (art. 41 (*f*) and (*g*)).

710. Under article 44 of the Convention, "any person or group of persons . . . may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party".

711. Any State party may, in accordance with article 45 of the Convention, when it deposits its instrument of ratification of or adherence to the Convention, or at any later time, declare that it recognizes the competence of the Inter-American Commission to receive and examine communications in which a State party alleges that another State party has committed a violation of a human right set forth in the Convention.

712. Admission by the Inter-American Commission of a petition or communication lodged in accordance with articles 44 or 45 is subject to the following requirements, as laid down in article 46, paragraph 1:

> (*a*) That the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
>
> (*b*) That the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
>
> (*c*) That the subject of the petition or communication is not pending before another international procedure for settlement; and
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> (*d*) That, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

713. Under paragraph 2 of the same article, the provisions of paragraph 1 (*a*) and (*b*) are not applicable when:

> (*a*) The domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
>
> (*b*) The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
>
> (*c*) There has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

714. Article 47 of the Convention establishes the reasons for which petitions or communications are inadmissible, while articles 48 to 51 relate to the procedure to be followed by the Commission when it receives a petition or communication alleging violation of any of the rights protected by the Convention. The procedure includes the conduct of investigations, the submission of requests for pertinent information and the drafting of reports stating the facts and either, if a friendly settlement is reached, the solution, or, if a settlement is not reached, the conclusions of the Commission. If within a period of three months the matter has not been settled or submitted by the Commission or by the State concerned to the Inter-American Court of Human Rights, the Commission may publish the report.

715. Although it was predicted that the American Convention on Human Rights would have a significant influence on future inter-American efforts to protect the rights and freedoms of the individual, some look upon such predictions with scepticism, pointing out that many of the basic values demanded by the Convention are formulated on high levels of abstraction or are not legally precise.[396] Furthermore, other writers observe that some of the standards provided for by the

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[391] See A. P. Schreiber, *The Inter-American Commission on Human Rights* (Leiden, Sijthoff, 1970), pp. 41–49; J. A. Cabranes, "Human rights and non-intervention in the inter-American system", *Michigan Law Review*, vol. 65, No. 6 (April 1967), pp. 1164–1173; and above, introduction, para. 127 and note 74.

[392] The statute of the Inter-American Commission on Human Rights is contained in *Human Rights Journal* (Paris), vol. I-1, 1968, p. 144 ff. See also, concerning the work of the Inter-American Commission on Human Rights, T. C. van Boven, "The United Nations Commission on Human Rights and violations of human rights and fundamental freedoms", *Netherlands International Law Review*, vol. XV, No. 4 (1968), pp. 374–393.

[393] L. R. Scheman, "The Inter-American Commission on Human Rights", *American Journal of International Law*, vol. 59 (1965), p. 338.

[394] See United Nations, *Treaty Series*, vol. 721, p. 364.

[395] Signed on 22 November 1969 by the following States: Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Uruguay, Venezuela; came into force on 18 July 1978. See above, introduction, paras. 128–129 and note 75.

[396] See A. van Wynen Thomas and A. J. Thomas, Jr., "Human rights and the Organization of American States", in N. S. Rodley and C. N. Ronning, eds., *International Law in the Western Hemisphere* (The Hague, Martinus Nijhoff, 1974), p. 170.

Convention are not acceptable to all members of the OAS.[397]

716. Certain parts of the Convention parallel the International Covenant on Civil and Political Rights, while other provisions vary distinctly.

717. For example, one of the most important provisions of the Convention is that of article 2, which reads as follows:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

718. This provision, which corresponds to article 2, paragraph 2, of the International Covenant on Civil and Political Rights, makes the American Convention non-self-executing in all countries which apply this doctrine.[398]

719. Thus, an attempt to invoke the American Convention on Human Rights in a national court, in order to assert a right guaranteed by it that is in conflict with or not recognized by existing domestic legislation, will be rejected on the ground that, without the additional domestic legislation envisaged by article 2 of the Convention, an individual can derive no rights directly from this Convention.

(e) *Inter-American Court of Human Rights*

720. The Inter-American system recognized that if human rights were to be protected adequately there was a need for international machinery to enforce international guarantees.

721. The Ninth International Conference of American States, in 1948, resolved that the Inter-American Council of Jurists and its permanent Committee, the Inter-American Juridical Committee, should give thought to a treaty providing for an "Inter-American Court to protect the Rights of Man".

722. After long examination the Juridical Committee reported that it was not feasible to create such a court because of the lack of substantive law on human rights and for certain other reasons.

723. The Fifth Meeting of Consultation of Ministers of Foreign Affairs, held in Santiago in 1959,[399] established the Inter-American Commission on Human Rights and issued orders to the Inter-American Council of Jurists to prepare draft conventions on human rights. The conventions were to include not only the Inter-American Commission on Human Rights but also another supranational mechanism to guarantee those rights—an Inter-American Court of Human Rights.

724. These two organs for protection of human rights and fundamental freedoms are established by the American Convention on Human Rights.[400]

725. If the Inter-American Commission on Human Rights is unable to bring about a settlement, the Convention establishes judicial machinery for implementation of the Convention, thereby attempting to remove human rights one step further from the political arena and place them under the jurisdiction of an independent juridical organ.

726. Articles 52 to 69 of the Convention provide for the organization, jurisdiction, functions and procedures of the Inter-American Court of Human Rights.

727. Thus, the Court consists of seven judges elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights.

728. Under article 71 of the Convention, "the position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member . . .".

729. The judges of the Court are never to be held liable for any decisions or opinions issued in the exercise of their functions.

730. Nevertheless, the General Assembly of OAS, at the request of the Commission or the Court, may determine sanctions to be applied against members of the Commission or judges of the Court when there are justifiable grounds for such action.

731. Under chapter VIII, section 2 (Jurisdiction and functions) of the Convention, the Court's jurisdiction is limited to States parties which have recognized the jurisdiction of the Court as binding in all matters relating to the interpretation or application of the Convention. Such recognition may be made unconditionally, on the principle of reciprocity, for a specific period, or for a specific case.

732. The Court also has a consultative function. Any organ of OAS as well as any member State of OAS—thus consultation is not limited to the signatories of the Convention—may request from the Court an interpretation of the Convention or any other convention concerning the protection of human rights in the American States. This would include interpretation of the International Covenants on Human Rights. In particular, a member of OAS may request an opinion of the Court regarding the compatibility of any of its domestic laws with these international instruments.

733. The jurisdictional clause states that ratifying States will accept as binding all decisions of the Court relating to the interpretation of the American Convention on Human Rights. Nevertheless, the Convention states that the Court's jurisdiction covers only States parties to the Convention which have accepted the Court's jurisdiction. If it is argued that this consultation is merely a "function" of the Court and cannot be considered jurisdictional because there is no controversy, the logical conclusion should be that the opinion of the Court in either case must be completely non-binding on members and non-members alike.[401] In any

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[397] See, among others, K. Vasak, *La protection internationale des droits de l'homme sur le continent américain: la Commission interaméricaine des droits de l'homme* (Paris, Librairie générale de droit et de jurisprudence, 1968).

[398] See T. Buergenthal, "The American Convention on Human Rights: an illusion of progress", in *Miscellanea W. J. Ganshof van der Meersch* (Brussels, Bruylant, 1972), vol. I, pp. 392-393.

[399] See *Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12-18, 1959: Final Act*, OAS, Official Records, OEA/SER.C/II.5 (Washington, D.C., Pan American Union 1960), resolutions VIII and IX.

[400] See para. 707 above.

[401] See Thomas and Thomas, *loc. cit.*, p. 190.

case it would be contrary to international law to demand that non-ratifying States be bound by an advisory opinion; nor could the Court require that the United Nations accept its interpretation of the International Covenants. Accordingly, only when treaty interpretation falls within the context of a case or controversy would ratifying States be bound by the Court's interpretation.

734. After a State has accepted the Court's jurisdiction, the dispute must be submitted to the Court either by the State or States involved or by the Inter-American Commission on Human Rights, and the proceedings before the Commission as outlined in articles 48–50 of the Convention must have been completed (Convention, art. 61).

735. In particular, the Convention denies the individual petitioner direct access to the Inter-American Court of Human Rights. The Commission must first have investigated the merits of the case, made a preliminary adjudication as to the admissibility of the complaint, attempted, but failed, to bring about a friendly settlement, and drawn up a report of its conclusions, proposals and recommendations. Even if all the above-mentioned prerequisites are fulfilled, it is still within the Commission's discretionary power to decide whether it will refer a case to the Court.

736. Thus, the Convention attempts to rebalance claims relating to the traditional sovereignty of nations against individual claims that sovereign nations are violating internationally protected human rights.

737. The Convention has certain dissimilarities and some similarities with the European Convention on Human Rights. For example, it contains no provision stating that a dispute as to whether the Inter-American Court has jurisdiction shall be settled by decision of the Court. In contrast, article 49 of the European Convention includes such a provision. The American Convention copies the European Convention in that it requires the regional Inter-American Commission to appear in all cases before the Court (art. 57).

738. The Inter-American Court is required to give reasons for its judgement and judges may issue concurring or dissenting opinions (Convention, art. 66).

739. If the Court finds that there was a breach of the Convention, it shall then rule that the victim of the violation be restored to his rights by the respondent State and, if appropriate, that he be paid a fair compensation for the denial of his rights (Convention, art. 63).

740. These compensatory damages may be executed in the country concerned in accordance with domestic procedures governing the execution of judgements against the State (Convention, art. 68).

741. The Convention states that the "parties to the case shall be notified of the judgment of the Court" (art. 69). The question that arises is whether a person complaining of violation of his human rights, who obviously has the greatest interest in the case's outcome, is a "party to the case". He is not entitled to bring the case before the Court and must be vicariously represented by the Inter-American Commission.

742. There is also no indication in the Convention that an individual may, after the Commission has brought the case to the Court, make submission through an attorney of his own choice.

743. A weakness of the Convention is its failure to include measures for implementing the Court's decisions.

C. Procedures and remedies available to individuals at the international level

1. PROCEDURES AND REMEDIES OF THE UNITED NATIONS

(a) *Communications from individuals under the Optional Protocol to the International Covenant on Civil and Political Rights*

Some preliminary observations

744. The International Covenants on Human Rights[402] and the Optional Protocol to the International Covenant on Civil and Political Rights,[403] concerning the right of individual petition in particular, constitute the first world-wide attempt to breach the walls of resistance which have long barred the way towards the reconstruction of international relations on new foundations and the effective protection of the individual.[404]

745. The International Covenants[405] not only give specific legal content to the broad spectrum of human rights but also provide the constitutional framework within which procedures can be evolved to deal with violations of human rights and fundamental freedoms.

The history of the right to petition and some points of discussion concerning the Optional Protocol

746. During the elaboration of the provisions for implementation of the International Covenants on Human Rights, various proposals and procedures for extending the right to initiate proceedings before the Human Rights Committee were suggested. Some persons unconditionally favoured the right of individuals, groups and non-governmental organizations to petition.

747. Some argued that only aggrieved persons directly affected by a violation should have the right of petition.

748. Others felt that the right of petition should be granted to non-governmental organizations or only to certain non-governmental organizations, especially those having consultative status with the Economic and Social Council.

749. Another view favoured empowering the Committee to act on its own motion.

750. Others advocated that only the right of communicating to the Committee should be recognized and that action thereafter should be left to the initiative of the Committee or the States parties.

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[402] The International Covenant on Economic, Social and Cultural Rights entered into force on 3 January 1976 and the International Covenant on Civil and Political Rights on 23 March 1976.

[403] Entered into force on 23 March 1976.

[404] See M. Moskowitz, *International Concern with Human Rights* (Leiden, Sijthoff, 1974), p. 108. In connection with the need for international protection of the individual, see J. Carey, *UN Protection of Civil and Political Rights* (Syracuse, N.Y., Syracuse University Press, 1970), pp. 1-3.

[405] See introduction, paras. 47–49.

751. This proposal was based mainly on the League of Nations procedure relating to minorities treaties, i.e., that only the right of communicating to the permanent organ of implementation should be recognized, and that action thereafter on any such communication from an individual, group or non-governmental organization should be left to the initiative of the organ or a State party.

752. The most radical view was that a High Commissioner (Attorney-General) for Human Rights should be appointed who would receive complaints from any source with authority to institute proceedings before the Committee.[406]

753. The above-mentioned proposals were either rejected or withdrawn.[407]

754. The main arguments for allowing individuals and non-governmental organizations to petition are summarized below.

755. Those opposed argued, *inter alia*, that only States were subjects of international law; that the provisions of the Covenant would be fully safeguarded by a system of State-to-State complaints and that, international responsibility for the promotion of human rights being a relatively recent development, it would be unwise to allow other means of initiating proceedings which might not be acceptable to many countries; and that, specifically, the proposals were imprecise as to the rights to be accorded to petitioners on the one hand and to the States concerned on the other, and contained no criteria by which the permanent organ of implementation could determine whether a matter was serious enough for it to exercise its conciliatory functions.

756. Those in favour argued, *inter alia*, that international law was not as restrictive as was claimed; that the problem of implementation had to be examined not only from the point of view of the rights of the State but also from that of the individual whose rights were being guaranteed; and that a system of State-to-State complaints would, for various reasons, not ensure effective enforcement of the provisions of the Covenant.

757. Those in favour maintained, further, that the experience of the Trusteeship Council and of the ILO did not bear out the fear that the right of petition would release a flood of malicious and groundless complaints which might overwhelm the permanent organ and paralyse its actions; that safeguards could be provided, such as rules governing admissibility and the screening of petitions; and that, moreover, matters could not be brought before the permanent organ of implementation until all possible methods of redress within the State had been exhausted.

758. The suggestion that any extension of the right to initiate proceedings should be included in a protocol or protocols to the Covenant was considered by some to be the most appropriate solution in view of the wide divergencies of opinion.

759. This would make it possible for States which desired to subscribe to a system of individual and non-governmental petitions to do so by becoming parties to the protocol or protocols.

760. At the same time, States which did not wish to go as far as that but nevertheless wanted to undertake the obligations under the Covenant would be free to do so.

761. In that way, advancement in the international protection of human rights would not be unduly postponed.

762. Others doubted whether the proposed procedure would serve any useful purpose. If most Member States refused to recognize the right of petition in the Covenant, it was hardly likely that they would change their minds when it came to inserting that right in a separate protocol or that they would be inclined to become parties to such an instrument.

763. The idea of a protocol was also opposed by those who desired the inclusion of the right to petition in the Convenant and by those who considered that right indispensable for the proper implementation of the Covenant.

764. A draft protocol[408] was before the Commission on Human Rights at its seventh session, but it was subsequently withdrawn and was not discussed in any detail.

The Optional Protocol to the International Covenant on Civil and Political Rights

765. When in 1966, the General Assembly adopted and opened for signature, ratification and accession the two International Covenants and the Optional Protocol to the International Covenant on Civil and Political Rights, it expressed the hope that the Covenants and the Optional Protocol would be signed and ratified or acceded to without delay and would come into force at an early date.[409]

766. Seven years later the International Covenant on Civil and Political Rights received the required number of ratifications and came into force, in conformity with its article 49.[410] The Optional Protocol to the International Covenant on Civil and Political Rights entered into force at the same time, having been ratified, as required, by at least 10 States parties to the Covenant in accordance with its article 9.[411]

767. In order to achieve the purposes of the International Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and in particular,

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[406] See "Bases of the proposal to establish a United Nations attorney-general for human rights: memorandum submitted by Uruguay" (*Official Records of the General Assembly, Sixth Session, Annexes* agenda item 29, document A/C.3/564); and *Official Records of the Economic and Social Council, Eighteenth Session, Supplement No.* 7, annex III, "Proposal for the establishment of an Office of the United Nations High Commissioner (Attorney-General) for Human Rights".

[407] *Official Records of the General Assembly, Tenth session, Annexes*, agenda item 28 (Part II), document A/2929, chap. VII, paras. 74–80.

[408] See *Official Records of the Economic and Social Council, Fourteenth Session, Supplement No. 4*, annex III A.

[409] General Assembly resolution 2200 A (XXI) of 16 December, 1966. See also introduction, paras. 46–49.

[410] See para. 744, footnote 402 above.

[411] See para. 744, footnote 403 above.

the implementation of its provisions, the Human Rights Committee[412] was enabled to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

768. Under article 1 of the Optional Protocol, a State party to the Covenant that becomes a party to the Optional Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant. No communication can be received by the Committee if it concerns a State party to the Covenant which is not also a party to the Optional Protocol.

769. A communication is inadmissible if it is anonymous, or if the Committee considers it to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant (Optional Protocol, art. 3).

770. Another basic prerequisite for consideration of a communication is that the individual has previously exhausted all available domestic remedies.[413]

771. The Optional Protocol does not lay down any time-limit for the receipt and consideration by the Committee of individual communications.

772. Under article 4 of the Optional Protocol, the State party concerned must submit written explanations or statements within six months clarifying the matter and the remedy, if any, that may have been taken by that State.

773. The Committee, in the light of all written information made available to it by the individual and the State party, considers the matter in closed meetings after ascertaining that:

(*a*) The same matter is not being examined under another procedure of international investigation or settlement;

(*b*) The individual has exhausted all available domestic remedies.

This is not to be the rule where the application of the remedies is unreasonably prolonged (Optional Protocol, art. 5).

774. The Committee is then obliged to forward its views to the State party concerned and to the individual.

775. The word "views" was preferred by the United Nations General Assembly to the stronger and more concrete terms "recommendations" and "suggestions".[414]

776. Under article 6 of the Optional Protocol the Committee is to include in its annual report under article 45 of the Covenant a summary of its activities under the Optional Protocol.

777. At the time of writing this part of the present study, the Committee had already published its report on its sixth and seventh sessions.[415]

778. Part V of that report, entitled "Consideration of communications under the Option Protocol", is devoted to communications submitted by individuals.

779. At its sixth session, the Committee had before it 25 communications for resumed consideration as well as eight communications which were brought before it for the first time.

780. At its seventh session, the Committee had before it 23 communications for resumed consideration as well as five communications which were before it for the first time.

781. A working group of the Committee was established under rule 89 of the provisional rules of procedure to make recommendations to the Committee regarding the fulfilment of the conditions of admissibility of communications laid down in articles 1, 2, 3 and 5, paragraph 2, of the Optional Protocol.

782. In addition to submitting recommendations to the Committee, the working group is empowered, under rule 91 of the Committee's provisional rules of procedure, to decide on its own to request information and observations from the States parties concerned and from the authors of communications relevant to the question of admissibility.

783. This working group may also be given the task, in accordance with rule 94, paragraph 1, of the provisional rules of procedure, of examining the merits of communications, with a view to assisting the Committee in formulating its final views under article 5, paragraphs 2 and 4, of the Optional Protocol.

784. The Committee has access to the original text of all submissions from States parties and from the authors of communications.

785. All documents related to communications under the Optional Protocol are confidential and are made available to the members of the Committee only.

786. The Committee's work under the Optional Protocol is divided into two main stages: (*a*) consideration of communications with a view to determining whether they are admissible under the Optional Protocol. The Committee may also at this stage, decide to discontinue consideration of a communication, without taking a decision as to its admissibility; (*b*) consideration of communications with a view to formulating the Committee's views on the merits of the case.[416]

(b) *The procedure under Economic and Social Council resolution 1503 (XLVIII)*

787. Economic and Social Council resolution 1503

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[412] The Human Rights Committee was set up in accordance with articles 28 to 45 of the International Covenant on Civil and Political Rights. It consists of 18 members, nationals of the States parties to the Covenant, who are to be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience. The members of the Committee are elected from a list of persons nominated by those States and serve in their personal capacity.

On 17 August 1979, the closing of the seventh session of the Human Rights Committee, there were 58 States parties to the Covenant and 21 States parties to the Optional Protocol. In addition, one other State ratified the Covenant on 21 June 1979. See Report of the Human Rights Committee, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 40* (A/34/40), para. 1.

[413] See M. Tardu, "The Protocol to the United Nations Covenant on Civil and Political Rights and the inter-American system: a study of co-existing petition procedures", *American Journal of International Law*, vol. 70, No. 4 (October 1976), pp. 780-781.

[414] *Ibid.*, p. 781.

[415] *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 40* (A/34/40).

[416] *Ibid.*, para. 443.

(XLVIII) of 27 May 1970, introduced an innovation at United Nations level concerning allegations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter, the Sub-Commission).

Background

788. The Commission on Human Rights was for almost 22 years reluctant to become an organ actively contributing to securing effective observance of human rights.

789. Suggestions and proposals to reconsider this self-denying ordinance were made in 1949 by the Secretary-General, in 1952, on an Egyptian initiative, by the General Assembly,[417] in 1956 by Greece[418] and in 1958 by Argentina and others.[419]

790. All these attempts were of no avail.

791. The breakthrough came in 1966–1967 on the initiative of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

792. After debates in several competent organs of the United Nations, the Economic and Social Council decided, by its resolution 1235 (XLII) of 6 June 1967, that the Commission on Human Rights could, in appropriate cases, make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of *apartheid* as practised in South Africa, and racial discrimination as practised notably in Southern Rhodesia.

Outline

793. This procedure was established in May 1970, by Council resolution 1503 (XLVIII), and the provisional rules for dealing with the question of admissibility of communications were adopted by the Sub-Commission in its resolution 1 (XXIV) of 13 August 1971.

794. Under the above-mentioned Council resolution,[420] the Sub-Commission has been authorized to appoint a working group of not more than five of its members to meet once a year in closed meetings, for a period not exceeding 10 days, immediately before the Sub-Commission itself meets, to consider communications with a view to referring to the Sub-Commission those communications which "appear to reveal a consistent pattern of gross and reliably attested violations of human rights".

795. The Sub-Commission also considers, in closed meetings, the communications brought before it with the replies of the Governments concerned and other relevant information and decides whether to bring to the attention of the Commission particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights.

796. In the view of the Special Rapporteur, reasonable time should be given to the Governments concerned to submit their replies.[421] This opinion is based on the true interpretation of the provisions of Sub-Commission resolution 1 (XXIV), paragraph 1 (*b*), and of Economic and Social Council resolution 1503 (XLVIII), paragraph 5.

797. The Commission on Human Rights in turn is authorized by the provisions of paragraph 6 of the Council resolution 1503 (XLVIII), after it has examined any situation referred to it by the Sub-Commission, to decide whether it needs further study, in which case a report and a recommendation may be submitted to the Council, or whether it should be the subject of an investigation by an *ad hoc* committee to be established by the Commission.

798. Such investigations, nevertheless, can be undertaken only with the consent of the Government concerned and must be conducted in constant co-operation with that Government and under conditions determined by agreement with it.

799. The procedure of investigation cannot take place unless all available means at the national level have been exhausted.

800. Further, the situation under consideration must not be connected with any matter which is being dealt with under other procedures, provided for by instruments of the United Nations or the specialized agencies or by regional conventions, e.g. the procedures provided for by the European Convention on Human Rights. Furthermore, the investigation is not to take place if the Government concerned states that it wishes to submit the matter under consideration to other procedures in accordance with another convention to which it is a party.

801. The Working Group met for the first time from 31 July to 11 August 1972. After having considered a number of communications, it submitted to the Sub-Commission, in a confidential document, its initial report. The Sub-Commission considered the report and adopted a resolution[422] in which it expressed, *inter alia*, its conviction of the importance of continued work by the Working Group as a necessary means of enabling the Sub-Commission and the Commission to perform the functions assigned to them under Council resolution 1503 (XLVIII).

Main characteristics

802. The following are the main characteristics of the procedure established by Economic and Social Council resolution 1503 (XLVIII).[423]

803. First, it is universal in scope.

804. Secondly, it does not deal with a single in-

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[417] General Assembly resolution 542 (VI) of 4 February 1952.

[418] See *Official Records of the General Assembly, Eleventh Session, Annexes*, agenda item 60, documents A/3187 and Add.1.

[419] See *Official Records of the Economic and Social Council, Twenty-sixth Session, Supplement No. 8*, paras. 183–197.

[420] See also Sub-Commission resolutions 1 (XXIV) and 2 (XXIV) in document E/CN.4/1070-E/CN.4/Sub.2/323, chap. XII.

[421] See Daes, "Protection of minorities under the International Bill of Human Rights and the Genocide Convention", *loc. cit.*, pp. 66–69.

[422] Sub-Commission resolution 2 (XXV) (E/CN.4/1101-E/CN.4/Sub.2/332, chap. XIV).

[423] See A. Cassese, "The new United Nations procedure for handling gross violations of human rights", *La Comunità Internazionale* (Rome), vol. XXX, Nos. 1–2 (1975), pp. 52–54.

fringement, but is only concerned with consistent patterns of gross and reliably attested violations of human rights.

805. Thirdly, its primary purpose is not to condemn States but to find out whether allegations of gross violations of human rights are substantiated and, if so, to help the States concerned put an end to, or at least curtail, such violations. The Commission on Human Rights is not expected to act as a tribunal; it is, rather, called upon to act as a fact-finding and conciliatory body.

806. Fourthly, the procedure is confidential. Everything must remain confidential until such time as the final stage is reached and the Commission on Human Rights decides what action it can recommend to the Economic and Social Council.

(c) *The decolonization machinery*

807. Under Article 76 of the Charter of the United Nations, the basic objectives of the trusteeship system are:

> (*a*) To further international peace and security;
>
> (*b*) To promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.
>
> (*c*) To encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
>
> (*d*) To ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80 [of the Charter].

808. The General Assembly, and, under its authority, the Trusteeship Council are authorized, under Article 87 of the Charter, to accept petitions and examine them in consultation with the administering authority.

809. The rules governing the consideration of petitions are contained in articles 76 to 92 of the rules of procedure of the Trusteeship Council.[424]

810. At present, the trusteeship procedure has not the same importance as it had when it was established, because of the accession to independence of most Trust Territories.

(d) *Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*

811. One of the basic purposes of the Charter of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" (Art. 1, para. 2).[425]

812. At its fifteenth session, the General Assembly adopted the historic Declaration on the Granting of Independence to Colonial Countries and Peoples.[426]

813. At its sixteenth session, the General Assembly, by its resolution 1654 (XVI) of 27 November 1961, established international machinery for the implementation of the Declaration in the form of a 17-member Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples[427] with a comprehensive system of subsidiary organs.

814. The General Assembly requested the Special Committee to examine the application of the Declaration and make suggestions and recommendations on the progress and extent of its implementation.

815. The United Nations organs for implementation of the above-mentioned Declaration provide machinery for implementation of the rights set forth in article 1 of both International Covenants on Human Rights.

816. The Special Committee and its subsidiary committees have addressed themselves not only to the right of peoples to self-determination but also to situations involving other human rights as well. In some instances these have related to colonial peoples and ethnic groups as a whole; in others, to smaller, less well-defined groups of persons and even to individuals.

817. Among the subsidiary bodies of the Special Committee is the Sub-Committee on Petitions, composed of seven members.

818. At its 8th meeting, on 5 March 1962, the Special Committee decided that "as additional means of acquiring information on territories under colonial domination", it would hear petitioners and receive written petitions.

819. The petitioners would be heard at the discretion of the Committee and not as a matter of course.

820. No special rules concerning the admissibility of written communications were approved, although in the course of the debates some members expressed the view that communications should be declared inadmissible if: (*a*) they were in direct contradiction with the mandate of the Special Committee; (*b*) they referred to Territories that were not on the Committee's list; and (*c*) they contained no information concerning their authors.

821. In 1972, the Special Committee decided that representatives of certain national liberation movements might be invited, in consultation with the Or-

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[424] For a detailed review of the trusteeship procedure, see M. Tardu, *Human Rights: The International Petition System* (Dobbs Ferry, N.Y., Oceana Publications, 1979), vol. I, part I, sect. I B, pp. 1–5.

[425] See, in this connection, H. Gros Espiell, *The Right to Self-determination: Implementation of United Nations Resolutions* (United Nations publication, Sales No. E.79/XIV.5); and A. Cristescu, *The Right to Self-determination: Historical and Current Development on the Basis of United Nations Instruments* (United Nations publication, Sales No. E.80.XIV.3).

[426] General Assembly resolution 1514 (XV) of 14 December, 1960.

[427] The membership of the Special Committee was expanded to 24 by General Assembly resolution 1810 (XVII) of 17 December 1962 and to 25 by General Assembly decision 34/425 of 13 December 1979.

ganization of African Unity, to participate in proceedings as observers.

(e) *United Nations Council for Namibia*

822. Under General Assembly resolution 2248 (S-V) of 19 May 1967, the United Nations Council for Namibia is to administer the Territory of Namibia until its independence, with the maximum possible participation of the people of Namibia in its work.

823. One of the basic functions of the Council is to deal with alleged violations of human rights in Namibia. The procedures followed by the Council are the granting of oral hearings to those wishing to submit relevant information or proposals to the Council and the consideration of written communications.

824. Written communications are examined by a standing committee of the Council.

(f) *The Fourth Committee of the United Nations General Assembly and individual petitioners*

825. The Fourth Committee has been granting requests for oral hearings to individual petitioners and representatives of national liberation movements.

826. When a request is made the Chairman of the Fourth Committee informs its members, and if there are no objections the request is circulated as a Committee document.

827. Petitioners and representatives of national liberation movements[428] are given the floor at meetings at which items relating to their territory are being considered.

(g) *Examination of gross violations of human rights by the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities*

828. In 1967, the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided that they would consider, each year, the question of the violation of human rights and fundamental freedoms.

829. During the annual discussions which have taken place since then, both the Commission and the Sub-Commission have heard a number of allegations that such violations had occurred in various countries and territories. All such allegations, as well as the replies made and the information furnished by the representatives of the Governments concerned, have been summarized in the records and reports of the two bodies mentioned above. In some cases resolutions on particular allegations have been adopted.

830. The following are among the working groups established by the Commission on Human Rights to investigate allegations of gross violations of human rights in various parts of the world:

(i) Ad Hoc *Working Group of Experts on southern Africa*

831. The Commission's *Ad Hoc* Working Group of Experts on violations of human rights in southern Africa, established in 1967, has investigated various allegations of ill-treatment of the opponents of *apartheid* and other racist policies in southern Africa.[429] In 1970, the Group submitted a report to the Commission[430] on a special investigation it had conducted at the request of the Commission in 1969 into allegations concerning, *inter alia*, violations of the Geneva Convention relating to the Protection of Civilian Persons in Time of War.

(ii) Ad Hoc *Working Group to inquire into the situation of human rights in Chile*

832. In 1975, the Commission set up an *ad hoc* working group to inquire into the situation of human rights in Chile, in view of reports it had received from a wide variety of sources that gross and massive violations of human rights had occurred in that country. Reports of the Working Group were considered by the Commission and by the General Assembly.[431]

833. These reports, based on voluminous written material and oral testimony, indicated, in the words of General Assembly resolution 31/124, that constant and flagrant violations of human rights had taken place and continued to take place in Chile, in particular the institutionalized practice of torture, cruel, inhuman and degrading treatment and punishment, the disappearance of persons for political reasons, arbitrary arrests, detention, exile and cases of deprivation of Chilean nationality.

834. The Commission on Human Rights, in 1977, requested its Sub-Commission to study the consequences of the various forms of aid extended to the Chilean authorities, and to analyse ways of giving humanitarian, legal and financial aid to those arbitrarily arrested or imprisoned in Chile, to those forced to leave the country, and to their relatives.

835. The General Assembly, later that year, in resolution 32/118, called upon the Chilean authorities to restore and safeguard, without delay, basic human rights and fundamental freedoms, and to respect the provisions of the relevant international instruments to which Chile is a party. It expressed profound indignation that the Chilean people continued to be subjected to constant and flagrant violations of human rights and fundamental freedoms, to lack adequate constitutional and judicial safeguards of their rights and liberties and to suffer assaults on the freedom and integrity of their persons, and expressed particular concern at the continuing disappearance of persons and the failure of the Chilean authorities to allow the *Ad Hoc* Working Group to visit the country in 1977.

(h) *Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*[432]

836. The Special Committee is composed of the

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[428] In accordance with a decision taken by the Fourth Committee in 1972, representatives of national liberation movements are invited to participate in the Committee's work as observers (*Official Records of the General Assembly, Twenty-seventh Session, Fourth Committee*, 1975th meeting, para. 67).

[429] See, for example, the report of the *Ad Hoc* Working Group of Experts prepared in accordance with Commission on Human Rights resolution 6 (XXXIII) and Economic and Social Council decision 1978/28 (E/CN.4/1311 of 26 January 1979).

[430] E/CN.4/1020 and Add. 1–3.

[431] See, for example, the report of the *Ad Hoc* Working Group established under resolution 8 (XXXI) of the Commission on Human Rights to inquire into the situation of human rights in Chile (E/CN.4/1310 of 1 February 1979).

[432] See, among others, J. A. Joyce, *The New Politics of Human Rights* (London, Macmillan, 1978), pp. 141–146.

representatives of three States. It has established its own procedures for investigation, which include field missions, the receipt of written and oral testimony, the monitoring of various information media, and the collection of public statements made by leaders of the Governments concerned.

837. The Committee reports each year to the Secretary-General, who transmits its reports to the Commission on Human Rights, the General Assembly and other competent organs.

838. In 1977, the General Assembly, after considering the Committee's report, requested it to continue to investigate Israeli policies and practices in the Arab territories occupied by Israel since 1967, and to consult as appropriate with the International Committee of the Red Cross in order to ensure the safeguarding of the welfare and human rights of the population of the occupied territories.

839. The Committee was also asked to make a special report on the treatment of civilians in detention in the Arab territories occupied by Israel since 1967.

(i) *Committee on the Elimination of Racial Discrimination*[433]

840. The International Convention on the Elimination of All Forms of Racial Discrimination established a "Committee on the Elimination of Racial Discrimination".

841. It consists of 18 individuals, "experts of high moral standing and acknowledged impartiality" who are elected by States parties from among their nationals under article 8, paragraph 1, of the Convention.

842. One of the basic functions and competences of the Committee is to receive and consider communications from individuals or groups of individuals within the jurisdiction of States parties which have recognized the competence of the Committee to this effect (Convention, art. 14).

843. In accordance with article 15 of the Convention, the Committee co-operates with other competent United Nations bodies in matters of petitions from the inhabitants of Trust and Non-Self-Governing Territories. It also considers copies of petitions, copies of reports and other information on racial discrimination relating to Trust and Non-Self-Governing Territories and to all other Territories to which General Assembly resolution 1514 (XV) applies transmitted to the Committee by the Trusteeship Council and by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

844. As mentioned above, article 14 of the Convention provides for the optional recognition by States parties of the right of individual petition. It avoids the term "petition" and speaks of "communications" instead (paras 1, 6, 7 and 8). The person from whom the communication originates is, however, called a "petitioner" (paras. 5 and 7).

845. While there is a difference between the right of petition as it exists under article 25 of the European Convention on Human Rights and the right of communication under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, the optional character is a feature common to both instruments.

846. Under article 14, paragraph 1 of the Convention, a State party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be the victims of a violation by that State party of any of the rights set forth in the Convention. No communication shall be received by the Committee if it concerns a State party which has not made such a declaration.

847. A declaration by a State accepting the right of communication may be withdrawn at any time, but such withdrawal shall not affect communications pending before the Committee (art. 14, para. 3).

848. According to article 14 of the Convention, the consideration of communications is to proceed in the following manner:

(*a*) The Committee shall confidentially bring the communication to the attention of the State party alleged to be violating any provision of the Convention (para. 6(*a*));

(*b*) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State (para. 6(*b*));

(*c*) The Committee shall consider communications in the light of all information made available to it by the State party concerned and by the petitioner (para. 7(*a*));

(*d*) The Committee shall forward its suggestions and recommendations, if any, to the State party concerned and to the petitioner (para. 7(*b*)); and

(*e*) The Committee shall include in its annual report a summary of the communications and, where appropriate, a summary of the explanations and statements of the States parties concerned and of its own suggestions and recommendations (para. 8).

849. The right to communicate with an international authority is, in article 14 of the Convention, juxtaposed to the right of petition to a body which a State party may establish or indicate within its national legal order. This body shall be competent to receive and consider petitions from individuals and groups of individuals who claim to be victims of a violation of any of the rights set forth in the Convention and who have exhausted other available local remedies (para. 2).

850. The link between the "body within the national legal order" and the international machinery consists in the facts that the name of the body is to be deposited with the Secretary-General, who transmits it to the other States parties (para. 3), and that certified copies of a register of petitions are to be filed annually with the Secretary-General (para. 4).

851. In the event of failure to obtain satisfaction from the national body, the petitioner has the right to

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[433] See above, introduction, paras. 57–73; and H. Santa Cruz, *Racial Discrimination* (United Nations Publications, Sales No. E.76.XIV.2), pp. 36–39.

communicate the matter to the Committee within six months (para. 5).

852. If a State party has not established or indicated the national body as contemplated in paragraph 2 of article 14, an individual or a group of individuals claiming to be victims of a violation of the Convention can, after the exhaustion of the local remedies provided in that State's general law, communicate directly with the Committee.

(j) *Procedure under article X of the International Convention on the Suppression and Punishment of the Crime of Apartheid*[434]

853. Article X, paragraph 1(a), of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* empowers the Commission on Human Rights to "request United Nations organs, when transmitting copies of petitions under article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination, to draw its attention to complaints concerning acts which are enumerated in article II of the present Convention".

854. The Commission on Human Rights is authorized, on the basis of these complaints and reports from competent United Nations organs and periodic reports from States parties to the Convention, to prepare a list of individuals, organizations, institutions and representatives of States which are alleged to be responsible for the crimes enumerated in article II of the Convention as well as those against whom legal proceedings have been undertaken by States parties to the Convention.

2. PROCEDURES AND REMEDIES PROVIDED BY SPECIALIZED AGENCIES

(a) *International Labour Organisation (ILO)*[435]

855. The tripartite formula of representation to the ILO ensures the participation of national and international trade union and employer associations as well as Governments.

856. The principle of public accountability is written into the norm-creating procedure: member States must report annually, indicating whether or not they have presented labour conventions to the competent authorities for ratification, the reasons for non-ratification, and the action taken to put ratified conventions into effect.

857. These reports are analysed by the Committee of Experts on the Application of Conventions and Recommendations,[436] which can and does request remedial action when the reports suggest imperfect implementation. If remedial action is not taken, the Committee refers the matter to the annual International Labour Conference, whose own Committee on Application may use the ultimate sanction available: placement of the recalcitrant member nation on a black list of unco-operative States.

858. The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), have a complaint procedure that goes beyond the annual reporting and follow-up system.

859. The crucial provision of the Freedom of Association and Protection of the Right to Organise Convention is that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation" (art. 2).

860. Public interference of any kind with the formation and continued operation of associations is forbidden, and this applies to units at the local, municipal, national, regional and international levels.

861. Organization is defined broadly to include any interest group other than the military and the police (arts. 9 and 10).

862. Member States must "take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise" (art. 11).

863. A possible remaining loophole is the provision that the rights guaranteed must be practised within the law of the land, though national law "shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for" in the Convention (art. 8).

864. The Right to Organise and Collective Bargaining Convention is a supplement to Convention 87, protecting workers in their jobs against anti-union discrimination: workers cannot be punished or penalized for organizing or participating in unions, or for engaging in collective bargaining.

865. This text does not formally recognize closed or union shops,[437] but it is so drawn up as to be acceptable to countries that have such institutions.

866. The complaint procedure that evolved came

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[434] See above, introduction, paras. 74–85.

[435] See introduction, paras. 24–27; and part one, para. 65, comments of ILO.

[436] See N. Valticos, "Comparative law and international labor law", in W. B. Butler, ed., *International Law in Comparative Perspective* (Alphen a.d. Rijn, Sijthoff and Noordhoff, 1980), pp. 286–289.

[437] In connection with "closed shops", Harry Street writes, *inter alia*:

> ". . . In particular, there is a clash between freedom of union organization and the right to work. It is a commonplace that in many factories there is now a closed shop: a man cannot be employed in a particular trade unless he is a member of a particular union."

(See H. Street, *Freedom, the Individual and the Law*, 4th ed. (Harmondsworth, Middlesex, Penguin Books, 1977), p. 252.)

He wrote further:

> "In 1970 Mr. Edwards, a coloured Guyanese member of the Society of Graphical and Allied Trades (SOGAT), complained of his union's treatment of him. SOGAT wrongfully expelled him from the union. Because of the closed shop, all he could then obtain was employment with a non-union firm, which dismissed him for refusing labouring work. He then became unemployed again. He sued the union for their unlawful expulsion which he claimed had, because of their closed shop system, made him virtually unemployable at his skilled trade of printer. The High Court awarded him £6,760 damages against the union (*Edwards* v. *SOGAT* [1970] I, *All England Law Reports* 905). The Court of Appeal confirmed that a union was liable for arbitrarily or capriciously controlling his livelihood. On the union's undertaking to the Court of Appeal to issue a full membership card the damages were reduced to £3,500 and interest at 6 per cent." (*Ibid*., p. 254.)

This was the situation that prevailed prior to the enactment of the Trade Union and Labour Relations Act of 1974 in the United Kingdom.

about through formal conventional or constitutional sanction.

867. It resulted from an agreement negotiated by ILO with the United Nations Economic and Social Council in 1950 setting up a Fact-Finding and Conciliation Commission on Freedom of Association.

868. This Commission was to settle disputes over the implementation of Conventions 87 and 98. However, it could not assume jurisdiction over a case unless a defendant Government expressly agreed.

869. Thereupon the Governing Body of ILO created a standing tripartite committee—the Committee on Freedom of Association[438]—mandating it to examine complaints to determine whether they merited investigation and eventual referral to the Fact-Finding and Conciliation Commission.

870. Within a few months the above-mentioned Committee, acting on behalf of the Governing Body of ILO, in effect became the parent commission hearing and disposing of the complaints that began arriving in large numbers.

871. The legal basis of the Committee's work, then, is the United Nations–ILO Agreement, together with the internal standing orders adopted by the Governing Body and amended occasionally thereafter.

872. Also, the Committee has successfully asserted that ILO members are subject to jurisdiction *sine die*, whether or not they have ratified the conventions under its protection; the legal basis for this claim is the ILO Constitution and the appended Declaration of Philadelphia (1944),[439] which are interpreted to mean that member States are obliged to foster freedom of association.

873. The nature of the complaints stretches the meaning of freedom of association very far. There are instances of: suppression of unions through murder, arrest and deportation; strike-breaking; restrictive and discriminatory compulsory registration procedures; rigged elections; suppression of union newspapers; discriminatory subsidization; and persecution of union leaders.

874. The Committee has also to examine a large number of problems relating to the application of the standards contained, in particular, in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).[440]

ILO Workers' Representatives Convention

875. On 23 June 1971 the General Conference of the ILO adopted the Workers' Representatives Convention, 1971 (No. 135) to supplement the Right to Organise and Collective Bargaining Convention, 1949.

876. The new convention defines the term "workers' representatives" as meaning persons recognized as such under national law or practice, whether they be trade union representatives—namely, representatives designated or elected by trade unions or by members of such unions—or elected representatives, namely, representatives freely elected by the workers of the undertaking whose functions do not include activities recognized as the exclusive prerogative of trade unions in the country concerned. It provides that such representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

877. It further provides that they will be afforded such facilities in the undertaking as may be appropriate in order to enable them to carry out their functions promptly and efficiently, as long as the granting of such facilities does not impair the efficient functioning of the undertaking concerned.

878. It further provides that where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or of their representatives.

Handling of allegations concerning infringements of trade union rights

879. In 1950, the Economic and Social Council in its resolution 277 (X), laid down the basic procedure for dealing with allegations concerning infringements of trade union rights, which has since been followed by the United Nations and ILO.

880. The Council decided that it would forward to the ILO Governing Body, for its consideration as to referral to the Fact-Finding and Conciliation Commission, all allegations regarding infringements of trade union rights received from Governments or trade union or employers' organizations against States members of ILO; and invited ILO to refer to the Council any allegations regarding such infringements against a State Member of the United Nations which was not a member of ILO.

881. At the same time, the Council requested the Secretary-General to bring to its attention any allegations concerning infringements of trade union rights which he might receive, and recommended that the General Assembly also should refer such allegations to the Council for action.

882. In 1951, the Governing Body of the International Labour Office established a Governing Body Committee on Freedom of Association for the preliminary examination of allegations concerning infringements of trade union rights and to consider the appropriateness of referral of particular cases to the Fact-Finding and Conciliation Commission. Since that time, the Governing Body Committee has considered

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[438] See *Freedom of Association, Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO* (Geneva, International Labour Office, 1972), pp. ix–xi. See also *Action Taken on the Resolutions Adopted by the International Labour Conference at its 59th to 64th Sessions* (Geneva, International Labour Office, 1979), International Labour Conference, 65th session, 1979, Supplement to the Report of the Director-General, pp. 1–3.

[439] See above, introduction, paras. 24–27. With respect to "complaints" under article 26 of the ILO Constitution, see Tardu, *op. cit.*, vol. I, part I, sect. II A, pp. 6–10.

[440] See, *inter alia, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Report and Observations concerning Particular Countries* (Geneva, International Labour Office, 1977), International Labour Conference, 63rd session, 1977, report III (part 4A), p. 22.

many hundreds of allegations, some of which it has referred to the Fact-Finding and Conciliation Commission for investigation and action. In 1953, the Economic and Social Council requested the Secretary-General to forward all such allegations directed against members of the ILO to the ILO Governing Body.

Allegations concerning infringements of trade union rights in southern Africa

883. In 1967, the International Labour Office transmitted to the Economic and Social Council allegations put forward by the World Federation of Trade Unions concerning flagrant violations of trade union rights in South Africa, which had ceased to be a member of ILO.

884. The Council decided to forward the allegations to the *Ad Hoc* Working Group of Experts on southern Africa, which the Commission on Human Rights had established earlier, and requested the Working Group to investigate them, report to the Council on its findings, and submit recommendations for action. In 1968, after considering the Working Group's report on the subject, the Council asked it to continue its investigation of allegations concerning trade union rights in South Africa, and also to investigate and report on such allegations relating to Namibia and southern Rhodesia.

885. Since that time, the *Ad Hoc* Working Group of Experts has submitted reports to the Council periodically on violations of trade union rights in southern Africa.

886. With respect to South Africa, the Council has called upon the Government of that country to conform to the generally-accepted international standards pertaining to the right to freedom of association, and in particular to permit trade unionists of all races, regardless of whether they belong to "registered" or "non-registered" organizations, to benefit from the facilities offered by the major international trade unions as regards educational and other assistance in the trade union field.

887. With regard to Namibia, it has condemned the South African Government for its infringements of trade union rights there, has noted with concern the continued absence of a trade union system in that Territory, and has strongly condemned the detention without trial of striking African workers in Ovamboland and their forcible return to the reserves.

888. With regard to southern Rhodesia, it has exposed and condemned the existence of so-called "transit camps" for the recruitment of forced labour, the discriminatory treatment of African workers, and the gradual withdrawal of limited trade union rights.

889. In 1974 and 1975, the Council authorized the *Ad Hoc* Working Group of Experts to investigate new allegations concerning infringements of trade union rights in South Africa put forward by two workers' organizations.

890. The Working Group reported its findings to the Council in 1977, at which time the Council transmitted further allegations against South Africa to it for investigation and report and authorized it to continue its study of the question.

(b) *United Nations Educational, Scientific and Cultural Organization (UNESCO)*[441]

891. The purpose of the United Nations Educational, Scientific and Cultural Organization (UNESCO) is, as laid down in article 1, paragraph 1, of its Constitution, "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations".[442]

892. The adoption of the UNESCO General Conference of a convention or recommendation imposes on the States members of UNESCO specific legal obligations which have been defined in the Constitution.

893. Moreover, the General Conference has adopted rules of procedure and decisions to govern the implementation of conventions and recommendations.

894. Unlike ILO, UNESCO has no constitutional or statutory arrangement for reviewing allegations concerning the implementation of its recommendations and conventions.

895. However, in the case of the Convention Against Discrimination in Education, the UNESCO General Conference in 1962 adopted a Protocol establishing a Conciliation and Good Offices Commission to assist States parties to that Convention to reach an amicable settlement of any disputes that might arise.

896. Communications concerning human rights received by UNESCO and within the competence of that organization are considered, after having been communicated to the Government concerned for observations, by a committee established by the UNESCO Executive Board. The Committee submits its reports and recommendations to the Board.

897. The handling of cases and questions concerning the exercise of human rights in matters falling within the competence of UNESCO is being studied with a view to improving the effectiveness of the organization's action in this field.

Joint ILO/UNESCO Committee of Experts on the Application of the Recommendation concerning the Status of Teachers

898. The decision to set up the Joint ILO/UNESCO Committee of Experts on the Application of the Recommendation concerning the Status of Teachers[443] was adopted at the fourteenth session of the General Conference of UNESCO (Paris, October-November 1966) and the one hundred and sixty-seventh session of the Governing Body of ILO (Geneva, November 1966).

899. The main objective of this Committee is to examine the reports received from Governments on

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[441] See part one, para. 65, comments of UNESCO, and paras. 321–328. See also "UNESCO and the challenges of today and tomorrow: universal affirmation of human rights" in B. G. Ramcharan, ed., *Human Rights: Thirty Years after the Universal Declaration* (The Hague, Nijhoff, 1979), pp. 197–210.

[442] See United Nations, *Treaty Series*, vol. 4, p. 277.

[443] In connection with this procedure, see Tardu, *op. cit.*, vol. I. part I, sect. II B, pp. 1–3.

action taken by them to implement the Recommendation concerning the Status of Teachers adopted in Paris on 5 October 1966 by a special intergovernmental conference.

900. The Committee adopts conclusions and recommendations concerning any studies it may consider necessary on situations where it feels that the application of the Recommendation is unsatisfactory.

901. The Committee's report is submitted to the governing bodies of ILO and UNESCO.

Communications on violations of human rights in education, science and culture

902. According to a new procedure adopted by the Executive Board of UNESCO, States, individuals, groups of individuals and non-governmental organizations are entitled to address communications to UNESCO concerning alleged violations of human rights in the fields of education, science and culture.

903. The authors of these communications must either be victims of the violations or have "reliable knowledge" thereof.

904. The procedure distinguishes between "cases", which conern individual and specific violations of human rights, and "questions", which refer to massive, systematic or flagrant violations of human rights, committed *de jure* or *de facto* by a State or resulting from an accumulation of individual cases forming a consistent pattern.

905. Communications must be submitted within a "reasonable" time-limit following the facts which constitute its subject-matter, or within a reasonable time-limit after the facts have become known.

906. The procedure includes many other requirements: for instance communications should not be submitted anonymously; they must not be manifestly ill-founded; and they "must appear to contain relevant evidence".

907. Another basic requirement is that the communication must be compatible with the principles of UNESCO, the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and other International instruments relating to human rights.

908. The Committee is required to submit confidential reports at each session of the Executive Board on the carrying out of its mandate under the present procedure.

909. These confidential reports of the Committee are to be examined by the Executive Board in private sessions.

910. Nevertheless, under rule 28, paragraph 16, of its rules of procedure, the Executive Board is empowered to decide whether or not its documents will be made public.

911. The only exception to the confidentiality of meetings relates to massive, systematic or flagrant violations of human rights and fundamental freedoms falling within UNESCO's fields of competence. Such questions are to be considered by the Executive Board and the General Conference in public meetings.

Chapter VI

CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

912. In the preceding chapters, the provisions of article 29, paragraphs 2 and 3, and article 30 of the Universal Declaration of Human Rights as well as the provisions of article 5, paragraph 1, and other articles of the International Covenants on Human Rights which provide for limitations and restrictions on certain basic rights and fundamental freedoms of the individual, have been surveyed and analysed in the present study on the freedom of the individual under law.

913. The foundations of personal freedom lie mainly in the ideas and institutions of political thought emanating from such concepts as "society" and "polity". Law (positive law) *a priori* mainly regulates personal freedom by prescribing the norms of "restraints" and "protections" manifested in the process of "invasion" of personal freedom.

914. The following are the main conclusions that emerge from the present study.

915. The ever-growing contemporary concern for protection of the freedom of the individual and his rights in general is a universal phenomenon.

916. Under the international system, individual freedom is a fundamental human right, and according to the legal norms of the system, "fundamental human rights" spring from the reaffirmation of the worth of the human person.

917. When examining the legal protection of the rights and freedoms of the individual in the hierarchy of norms, provisions on the rights and freedoms of the individual gain real significance if they are included in a constitution which occupies a superior position in the national legal hierarchy or which has a greater degree of formal legal validity.

918. The freedom of the individual should be guaranteed by the national constitution as the basis of his general legal position and scope for development, and should occupy the highest place among his rights.

919. The national constitution should be the primordial source of every law so that no rule can conflict with that supreme law which is the fundamental charter of the nation.

920. Legal order requires that the constitution shall take precedence over all other rules. Laws, decrees, legal acts and orders must therefore be in conformity with the constitution. To ensure such conformity it is necessary to verify the constitutionality of laws.

921. Limitations or restrictions must be laid down by law or be authorized by law.

922. The changes that have taken place on the international scene merely emphasize that law is but a reflection of the beliefs and needs of the community it is intended to serve. It is neither rigid nor sacrosanct, and as those needs and beliefs change, so the law, if it is to be observed, must change with them.

923. The world community should accept the thesis that the seat of human rights is primarily in the conscience of mankind and then in moral and positive law.

924. The "third world" concept may also lose its relevance in the near future, leading to the founding of a "world community" which indeed has already come into being.

925. Accordingly, every effort should be made by the world community, the State, every organ of society and, in particular, the mass media to educate individuals about their responsibility to strive for the promotion and protection of human rights.[444]

926. Laws and human rights guaranteed by the constitution should be administered on a non-discriminatory basis.

927. "Discriminatory" in this context means that different treatment is given to different persons wholly or mainly because of their race, place of origin, colour, religion, or political opinions, so that persons of one description are subjected to disabilities or restrictions to which persons of another description are not subject or are accorded privileges or advantages not afforded to persons of another description.

928. The provisions of article 29, paragraphs 2 and 3, of the Universal Declaration and of the corresponding articles of the International Covenants also restrict the rights and powers of the State in order that such limitations or restrictions are not used for improper purposes.

929. The provisions providing for limitations should be interpreted narrowly.

930. The imposition of arbitary limitations or restrictions on basic human rights and freedoms is tantamount to the abolition of liberty, because basic individual rights are identical to individual freedoms.

931. In any case, the aforementioned provisions as well as the provisions of the corresponding articles of the International Covenants should be discussed and examined in conjunction with the provisions of articles 28 and 30 of the Universal Declaration and article 5 of the International Covenants.

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[444] See, in particular, Commission on Human Rights resolution 23 (XXXVI), para. 1; and part one above, chap. III, Recommendations.

1. Types of limitations or restrictions

932. The precise scope of rights and the extent of limitations or restrictions cannot always be determined in advance. Rules recognizing or conferring rights, like all other legal rules, are subject to a continuing process of interpretation.

933. The Universal Declaration of Human Rights sets out the rights of the individual; only in article 29, paragraphs 2 and 3, and article 30 does it provide for grounds on which limitations determined by law should be permitted.

934. The same method was followed in article 4 and article 5, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights.

935. On the other hand, the International Covenant on Civil and Political Rights spells out the content of the rights guaranteed and specifies the grounds authorizing limitations or restrictions on the exercise of those rights.

936. The first method was also adopted for the Fifth and Fourteenth Amendments to the Constitution of the United States of America, in the Basic Law of the Federal Republic of Germany and in some other modern constitutions.

937. Rights are in certain cases subject to "inherent limitations" which although not express are necessarily implied in the formulation of the right.

938. Alternatively, it may be said that limitations or restrictions for which no express provision is made do not really affect the substance of the right guaranteed. Such limitations or restrictions leave the essence of the right intact and affect only the conditions under which the right may be exercised.

939. Only where the rights are defined or "delimited" does it become relevant to ask whether, in a particular case, the acts of public authorities fall within the limitations expressly laid down or, on the other hand, constitute legitimate restrictions on the exercise of the right.

940. In the Universal Declaration and the International Covenants three types of provisions deal, directly or indirectly, with limitations or restrictions imposed on the rights and freedoms guaranteed therein:

(*a*) Provisions of a general character which, in substance, authorize limitations or restrictions on rights for other more general reasons;

(*b*) Some provisions which, while recognizing a particular right or freedom, expressly stipulate the limitations or the restrictions to be imposed thereon in certain circumstances;

(*c*) Other provisions of a general character which limit the application of restrictions authorized by other articles.

2. Requirements for the imposition of limitations or restrictions on certain human rights and freedoms

941. The most important requirement is that the limitations or restrictions must be legal. They must be in accordance with the law. But, since law does not always effectively ensure the protection of human rights, it would be meaningful to say that the limitations or restrictions should be "legitimate".

942. Law is the guarantor of freedom. It should be founded on "reason" and it should be just.

943. The limitations or restrictions must always meet the just requirements of morality, public order and the general welfare in a democratic society.

944. Limitations or restrictions should be justified by specific reasons, including recognition of and respect for the rights of others, morality, public order, public security, national security, public health and general welfare.

945. On the basis of the aforementioned grounds, and always as defined by law, States may impose limitations or restrictions on the exercise of certain individual rights.

946. Nevertheless, States are in no way obliged to do so.

947. Any legislative limitation or restriction on human rights requires constitutional authorization. In this respect, the national constitution must determine under what conditions, to what extent, on what grounds, for which purposes, and under what form it is permissible to interfere with or to restrict human rights.

948. Constitutional provisions authorizing limitations or restrictions on individual human rights must be drafted in very precise terms.

949. These provisions should be interpreted strictly and in such a manner as to ensure that human rights are not interfered with otherwise than as clearly and expressly intended.

950. Any doubt concerning the interpretation of such constitutional provisions should operate in favour of the individual. In certain cases, laws and individual rights should be mutually restrictive.

951. Limitations or restrictions on human rights and freedoms should not be resorted to except for the purposes for which they have been prescribed and they should not remain in force longer than the minimum period for which they are required.

952. The greater the limitations on the legislative power in the imposition of restrictions on human rights, the lesser the danger of annihilation of individual freedoms being limited.

953. The legislature can sometimes threaten to restrict and annihilate the freedom of an individual.

954. In addition to the need for constitutional authorization for imposing limitations or restrictions on human rights, the legislature should also observe the following limits on its power:

(*a*) The need not to impair the exercise of the fundamental rights and freedoms of the individual;

(*b*) The need to refrain from enacting retroactive legislation;

(*c*) The need to draft framework laws (*lois-cadres*) with care and clarity as one more safeguard for an individual wishing to know and to protect his rights, and as a further protection against arbitrary imposition of limitations or restrictions or against even arbitrary interpretation of the law.

955. The legislature is the sovereign political organ

of the State and as such has the right and the obligation to control the executive and administrative authorities.

956. The direct imposition by the executive of limitations or restrictions should be an exception.

957. In emergency situations[445] requiring speedy action it may be particularly necessary to grant the executive a wide power to issue decrees. In many instances, therefore, all the legislature can do is to adopt a legal framework and permit the administration to fill in details.

958. Nevertheless, the legislature should devise means whereby the executive can be controlled in the exercise of its delegated powers.

959. The parent statute of delegated legislation should in any case include a limitation of time beyond which the power to legislate will no longer be vested in the executive, or a requirement that subsidiary legislation be renewed after a certain period of time.

960. The delegated legislation on certain subjects should be revised and consolidated at appropriate intervals, so as to make it easily intelligible to the man in the street.

961. Delegated legislation should also observe uniformity of terminology, so that the individual may be assured that the same terms always mean the same things.

962. It is not enough for the executive and the administrative authorities to apply the letter of the law; they should at the same time respect the letter and the spirit of the law, which should be in accordance with the Universal Declaration of Human Rights, the International Covenants on Human Rights, other international instruments on human rights and the democratic constitution of the State.

963. Great attention should be paid to the procedures which the administration should feel bound to follow or be required by statute to follow, in using powers granted by statutes or by delegated legislation enacted under statutory authorization.

964. For example, the administration should not impose limitations or restrictions preventing an individual from being heard in any action involving his rights; on the contrary, procedures should be enacted, if they do not exist, to recognize *inter alia* the following rights of the individual:

(*a*) The right to know the facts on the basis of which the administrative decision on his case was taken;

(*b*) The right to attend the proceedings and to ask questions;

(*c*) The right to require the administrative authority to state its reasons for the decision reached and, moreover, to do so in writing; and

(*d*) The right to appeal to a higher administrative authority.

3. Significance of article 30 of the Universal Declaration of Human Rights and article 5 of the International Covenants on Human Rights

965. The limitations and restrictions should be clearly established so that they do not operate in a manner contrary to the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and other relevant international and national instruments.

966. The limitations or restrictions limit not only the exercise of certain rights of the individual but also the power of the State to restrict human rights arbitrarily in any manner it might choose.

967. Article 30 of the Universal Declaration and article 5 of both International Covenants contain the saving clauses.

968. The main purpose of this fundamental provision is to safeguard the rights enumerated in the Universal Declaration and the International Covenants, through the protection of the free functioning of democratic institutions.

969. The scope and purpose of article 30 of the Universal Declaration and article 5, paragraph 1, of both International Covenants are to provide protection against any misinterpretation of any provision of the Universal Declaration and the International Covenants which might be used to justify the infringement of any rights and freedoms recognized in these international instruments or the imposition of limitations on any such right or freedom to a greater extent than is provided for therein. The purpose is also to limit the rights guaranteed only to the extent that such limitation is necessary to prevent their total subversion. The limitation must be narrowly interpreted in relation to this object.

970. The provisions of the aforementioned articles are also designed to check certain acts or activities of any State, group or person aimed at the destruction of any of the rights or freedoms recognized in the Universal Declaration and International Covenants or at their limitation to a greater extent than is provided for in these international instruments.

971. No State, group or individual with such tendencies may invoke the Charter, the Universal Declaration or the International Covenants to justify such destructive activity.

972. Article 30 of the Universal Declaration and article 5, paragraph 1, of the International Covenants contain an explicit and binding interpretative rule in the sense of an absolute guarantee of the substance of human rights. Hence the interpretative rule of these provisions prohibits any unreasonably extensive interpretation of the limits of human rights.

973. The provisions of the above-mentioned article 30 of the Universal Declaration and article 5, paragraph 1, of the International Covenants cannot be used to deprive an individual of his rights and freedoms permanently, merely because at some given moment he performed an act or engaged in an activity aimed at the restriction of any of the rights or freedoms recognized by the Universal Declaration or the International Covenants.

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[445] A thorough analysis of the protection of human rights and fundamental freedoms in a state of emergency, based mainly on article 4 of the International Covenant on Civil and Political Rights, is presented in part three of the present study.

974. Further, with regard to the provisions of article 30 of the Universal Declaration in relation to those of article 29, the two texts may be regarded as complementary, since article 30 provides as a requirement that no State, group, or legal or private person can, in any case, by extension, invoke any of the provisions of the Declaration so as to prejudice in any manner whatsoever the rights and freedoms proclaimed in that Declaration.

975. Special mention should be made of the reference to "any State" in article 30 of the Universal Declaration and in article 5, paragraph 1, of the International Covenants, since it points up the fact that those articles contain two distinct prohibitions:

(*a*) No individual or group may use the provisions of the Universal Declaration or the International Covenants as a shield for activities which will undermine those instruments; and

(*b*) The State may not use the aforementioned articles as a sword to limit or restrict rights and freedoms beyond what the Universal Declaration and the International Covenants allow.

976. Article 5, paragraph 2, of the International Covenants contains a provision which would regulate possible conflicts between the provisions of the Covenants and the law, conventions, regulations or customs of any State party. It prevents any State party from restricting or diminishing fundamental human rights already enjoyed by individuals within their territories on the grounds that such rights are not recognized in the International Covenants or are recognized to a lesser extent.

977. Accordingly, the rule of article 5, paragraph 2, of both International Covenants is that in case of conflict between the provisions of the International Covenants and the law, conventions, regulations or customs of any State party, the provisions giving the maximum protection for the rights and freedoms of the individual should prevail.

4. INTERPRETATION OF THE GROUNDS FOR LIMITATIONS OR RESTRICTIONS ON CERTAIN HUMAN RIGHTS

978. Constitutional, legislative and regulatory provisions of a modern State should be drawn up so as to reconcile the full exercise of the human rights and fundamental freedoms enshrined in the Universal Declaration and the International Covenants, with only such limitations as are determined by law solely for the purpose of securing due recognition of and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, public safety, national security, public health and general welfare in a democratic society.

979. However, such notions and terms as "respect for the rights and freedoms of others", "morality", "public order", and "general welfare" escape uniform effective definition at international level.

980. These notions and terms are expressive of imponderable concepts, the real content of which can only be ascertained on pragmatic lines in the light of the ever-varying circumstances and conditions of modern life in a world community.

981. This combines all the factors for the establishment of a society "with a human face", in which the spiritual heritage of the national past can be harmoniously integrated with the dynamism required for the modern development of the country's full potential and in which an equitable balance can therefore always be maintained between the individual's rights and freedoms in a democratic society and the general welfare of the community as a whole.

(a) *Respect for the rights and freedoms of others*

982. Respect for the rights and freedoms of others is one of the most important limitations on the exercise of individual basic rights.

983. It stems from the knowledge that the individual and his human rights cannot be viewed in isolation.

984. Everyone must realise that the human rights of others are no less worthy of protection than his own.

985. Thus, the right to freedom of expression, for example, does not entitle one to insult or slander others.

986. The meaning of this limitation should be the following: no one infringing the rights of another individual can justify this infringement by invoking his own individual right, in particular against another individual or against the State.

987. A concluding observation relating to the theory and practice of limitations on the exercise of human rights is that limitations on the individual's rights are also justified when intended to protect the liberties of others.

(b) *Morality (morals)*

988. As individuals do not live in isolation, they must not only respect the rights and freedoms of others but must also take into account the generally accepted moral code.

989. The substance and the meaning of such public morals may differ from people to people, from State to State and from one region of the world to another; moreover they are subject to a process of historical change.

990. The possibility of imposing limitations on human rights in regard to morals must, however, be kept within reasonable bounds because of the danger of abusing such vague terms.

991. For the purpose of the present study, morals could be defined as the relationship between human acts and the ethical principles by which they are governed.

992. No one can justify his immoral behaviour by invoking his individual human rights.

993. The view that in an enlightened age positive law has to be evaluated by the standard of moral ideas seems to be incontestable.[446]

(c) *Public order* (ordre public)

994. The concept of public order is difficult to define, since it is open to several interpretations, varies

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[446] H. Jones has said that morality must form a part of our legal norms unless we are prepared to discard our moral convictions at the points of strain at which moral insights are most needed. H. Jones, "Law and morality in the perspective of legal realism", *Columbia Law Review*, vol. LXI, 1961, pp. 799–809.

in time and space from one country to another, and is not immutable in a given society.

995. Many writers have been unsuccessful in their attempts to define the concept because of the many forms it can assume.

996. The development of customs, social, political and moral standards can sometimes lead to startling changes in the accepted view of public order.

997. For the purpose of the present study, public order could be defined as the sum of the rules which ensure the security of a society; or the set of fundamental principles on which the interests of a given society are founded and violation of which may imply only partial illegality of a legal act or foreign law the application of which is permitted in the national territory.

998. Public order also refers to the nature of the legal rules which, for reasons of morality or essential security, are necessary in social relations.

999. Public order (*ordre public*) should not be interpreted as an abstract concept but in the light of the purpose of the human right concerned which is restricted by the reference to public order.

1000. The general meaning of the term "public order" is not necessarily antithetical to disorder. It is wide enough in scope to include considerations in certain cases of public safety.

1001. With respect to "public order" as a ground for imposing limitations, it should also be observed that in a life of give and take one has to behave in a manner imposed by good faith; likewise in a society organized in a State an individual has to behave in such a way that "public order" and "public safety" are not disrupted.

1002. In this case the action of the State has the effect of limiting the individual human rights.

1003. The limitation of police power constitutes a protection of individual human rights, and a lawful limitation on individual human rights constitutes a lawful police rule or lawful action.

1004. Every State should try to set limits on preventive police action with a view to safeguarding the fundamental rights of the individual.

1005. Factors exerting a restraining influence on the police are, among others, the following: control and guidance by the courts; public opinion; a free press; and, above all, education, including courses on human rights and proper training of the police force.

1006. The public in general expect policemen to prevent disorder and violence but are quick to criticize the police for any possible excess use of power.

1007. A co-operative and understanding relationship between the public and the police in the exercise, in particular, of the right to assembly would greatly help the police and contribute to the prevention of incidents.

1008. In any case, no more force should be used than is believed to be necessary and appropriate in the circumstances; the amount of compulsion being used should never be disproportionate to the gravity of the perils to be avoided.

1009. Police should be constantly educated and trained to have self-confidence, self-discipline and integrity, to display moral rectitude in their conduct, not to abuse their powers and to respect and protect the individual's rights and freedoms.

(d) *General welfare*

1010. Only in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights does "general welfare" constitute a ground for imposing limitations on human rights.

1011. The International Covenant on Civil and Political Rights does not contain any comparable general clause, because of the vagueness of such a clause and the concomitant danger of abuse.

1012. The concept "general welfare" varies with the time and the state of society and its needs.

1013. Its meaning is flexible and is ascertained with reference to the circumstances prevailing at a particular time.

1014. The concepts of "general welfare", "public interest" or "general interest" should constitute the basis for imposing temporary limitations or restrictions on certain human rights with a view to accelerating economic and social development, protecting the human environment, human settlement or public health in a democratic society.

1015. Human rights could be temporarily limited, in particular in less developed countries, on the grounds of "general welfare", for reasons pertaining to "economic and social development".

1016. The national legislation of a great number of States provides for "general welfare" as a reason for imposing limitation on the exercise of basic rights in connection with the protection of property.

1017. Such legislation declares that expropriation is permissible only for the "general welfare" or "public interest" and in return for just compensation.

1018. For the purpose of the present study, the term "welfare" will basically mean the economic and social well-being of the people and the community.

1019. Any lawful limitation or restriction in favour of the whole community, consequently the protection of "public interest", should be above the individual interest.

1020. The measure of the public interest should define the extent of restriction of the individual's freedom.

1021. In cases where purely property rights are involved, the resulting conflict between such rights and the "general welfare" could well be resolved in the community's interest provided that all other relevant conditions have been respected.

1022. The foremost task and challenge facing Governments and leaders, particularly of the "third world", is to achieve compromise and balance in steering their States and people to relative prosperity and in successfully combating arbitrariness, violations of human rights, violence and misery.

(e) *Public safety*

1023. Public safety would imply the existence of a set of provisions intended to ensure, within a country, public peace, social harmony, respect for just law and the legitimate decisions or orders of the public authorities.

1024. Public safety could also mean safeguarding all individuals as far as possible from any danger in any form. It includes matters which are necessary for the safety of the general public.[447]

(f) *Social security*

1025. The limitation of human rights on the ground of "social security" (i.e., the security of society) can be understood as signifying measures adopted for the protection of society against such acts of individuals as are prejudicial to its interest.

1026. However, law may recognize the position that in certain circumstances preventive measures can also serve "social security" without unduly restricting the freedom of the individual.

1027. "Preventive justice" is an ancient concept reflecting the anxiety of philosophers and lawyers to fulfil the need of harmonizing the conflicting values—the need to strike a just and proper balance between the interests of society and the individual and also the need to bridge the gap between law and morality.

(g) *National security*

1028. National security means peace and stability in the community. The concept would seem to relate to measures enacted with a view to safeguarding territorial integrity and national independence from any external threat. It covers any activity prejudicial to the very existence of the State.[448] Nevertheless, this requirement should not be used as a pretext for imposing arbitrary limitations or restrictions on the exercise of human rights and freedoms.

(h) *National security and social security*

1029. These two concepts, in the present study, are meant to denote the legal norms concerned with the protection of the "State" in the first case and of "society" in the second.

1030. The aims and attitudes of several organs of the State (such as the executive, the legislature, the judiciary) and social agencies of society (such as the individual, the family, the group and organizations) respectively are influenced and moulded by "public opinion".

1031. Public opinion is meant to include not only the activities of the various media but also all kinds of public, private, parliamentary and juristic debates. The scope of the debate and the extent of human involvement in it determines its capacity to mobilize "public opinion". Such debates evidently form an essential element of the vitality of "public opinion".

(i) *Public health*

1032. Obligatory isolation or hospitalization in certain cases, for example when an individual is suffering from a communicable disease, constitutes a limitation on freedom of movement and the right to liberty and security of person.

1033. Protection of health or morals covers not only the general protection of the health or morals of a community as a whole, but also the protection of individual members of the community.

1034. The terms "health"[449] and "morals" denote both the psychological and the physical well-being of individuals.

1035. Exemption clauses limiting rights on grounds of public health, national security and public safety should, in principle, be narrowly interpreted.

(j) *Abuse of a right*

1036. Another general limitation imposed by law on the individual's rights and freedoms is that of the prohibition of abuse of any right.

1037. Abuse of a right should be regarded as using the right while changing its purpose thus, pursuing opposite aims to those properly envisaged by the right.

1038. Abusive use of a human right should also be considered to be use contrary to the spirit and scope of the right.

1039. The abuse of any right should be considered illegal.

(k) *Democratic society*

1040. The term "democracy" has a long history and has been applied with some consistency to a form of government in which the people rule and in which the political power is held by many rather than by the one or the few.[450]

1041. Democracy exists where sovereignty belongs to all free men without any discrimination.

1042. Democratic government means the rule of the majority in the interest of all. Such a government has to establish equal opportunities for majority and minority groups where they exist.

1043. There is no democracy when a minority dominates a majority deprived of freedom.

1044. The term "society" used in the Universal Declaration of Human Rights and the International Covenants on Human Rights in a wider sense should denote the community, the public or the people in general.

1045. The expression "democratic society" is not defined in the International Covenants and guidance may therefore be sought from article 21 of the Universal Declaration, which reads:

> 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> 2. Everyone has the right of equal access to public service in his country.
>
> 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

1046. Regardless of how democracies may style themselves—direct, representative, western, liberal, socialist, bourgeois or popular—they are only real and pure democracies when they guarantee and respect human rights and fundamental freedoms, including, in particular, the right of everyone to participate in political life at the local and national level by means of free and genuine elections, by universal and equal suffrage, enabling each people to choose freely and periodically its own government and recognizing the activities of pluralist political institutions.

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[447] See chap. II, sect. G (paras. 219–251).

[448] *Ibid.*

[449] See chap. II, sect. I (paras. 288–297).

[450] See chap. II, sect. J (paras. 298–314).

1047. Accordingly, a democratic society is one which respects human rights and fundamental freedoms, such as freedom of conscience and of association, and the right to participate in political life at the local and national level by means of free elections, so that citizens can choose periodically their own government.

1048. Only a democratic society provides adequate guarantees that the permissible grounds for limitations are not misused to oppress persons or suppress opinion and prevent public meetings.

(l) *The expression "solely for the purpose"*

1049. The expression "solely for the purpose"[451] limits the rights and powers of the executive and administrative authority in imposing limitations and restrictions on human rights other than those expressly provided for by the relevant provisions of the Universal Declaration, the International Covenants and the national legislation.

5. CONCLUDING REMARKS ON FUNDAMENTAL PRINCIPLES GOVERNING LIMITATIONS OR RESTRICTIONS ON HUMAN RIGHTS

1050. The following are among the fundamental principles governing limitations or restrictions on individual's rights or freedoms.

(a) *The principle of respect for the dignity of the individual*[452]

1051. The dignity of the individual is the first principle recognized by the Universal Declaration of Human Rights.

1052. In every free society governed by the rule of law, the function of the authorities of the State is to establish and maintain conditions in which the dignity of every person is recognized.

1053. No derogation from the right to human dignity should be permitted. For this reason, the prohibition of torture or inhuman punishment or treatment should not be subject to any restrictions or derogation.

1054. Hence, arrested or detained persons should not be physically or psychologically mistreated.

1055. Any limitations or restrictions which affect human dignity should be unlawful. The dignity of man must be inviolable.

1056. Even matters of great importance directly concerning the general interests of the State cannot take precedence over human dignity.

(b) *The principle of legality*

1057. Another important principle is the principle of legality, which may be formulated as follows: everyone is presumed to be free and no restrictions on this liberty will be imposed except under law.[453]

(c) *The principle of the rule of law*

1058. The rule of law[454] is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a democratic society but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.

1059. The rule of law cannot be fully realized unless legislative bodies have been established in accordance with the will of people who have adopted their constitution freely.

(d) *The principle that human rights and freedoms are absolute and that limitations or restrictions are the exceptions*

1060. With respect to this principle, reference is made to the comments in paragraph 363 above.

(e) *The principle of equality and non-discrimination*

1061. The principle of equality[455] is not a simple guideline or recommendation but a strict provision of vital importance which imposes on the judicial authority the obligation to find out if the legislative authority has applied the principle of equality of individuals and, in cases of violation of this principle, to direct that the offending laws should not be imposed.

1062. In particular, the principle of equality, in the sense both of equality before the law and of equal protection by the law, should generally be regarded as a basic prerequisite of human rights protection.

1063. Hence the principle of equality and non-discrimination is an important feature of the theory of limitations on the exercise of individual rights and freedoms.

(f) *The principles* nullum crimen, nulla poena sine lege *and non-retroactivity of criminal law*

1064. The basic principle that no one shall be punished for anything that did not constitute a penal offence under international or national law at the time it was committed[456] is, *inter alia*, contained in article 11, paragraph 2, of the Universal Declaration and article 15 of the International Covenant on Civil and Political Rights.

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[451] Universal Declaration of Human Rights, art. 29, para. 2.

[452] See chap. III, sect. C (paras. 359–362).

[453] See the Act of Athens, adopted by the international congress sponsored by the International Commission of Jurists in Athens, Greece, in June 1955.

[454] The Act of Athens reiterates, *inter alia*, that the State is subject to the law and that Governments should respect the rights of the individual under the rule of law and provide effective means for their enforcement. It further states that judges should be guided by the rule of law, protect and enforce it without fear or favour and resist any encroachments by Governments or political parties on their independence as judges. See also chap. III above.

[455] See chap. III, sect. E (paras. 364–375).

[456] See chap. III, sect. F. (paras. 376–384).

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1065. In particular, the principle of *nullum crimen sine lege* requires that the offence be defined by law and commonly known as such.

(g) *The principles of a fair and public hearing in judicial proceedings and* non bis in idem

1066. With respect to this principle, reference is made to the comments in paragraphs 385–389 above.

(h) *The principle of proportionality*[457]

1067. Legally permissible restrictions should not go further than is absolutely essential to achieve the given purpose, and they must be commensurable with that purpose. This follows from the principle of commensurability, which should have constitutional status and whose observance should be verifiable by the courts.

(i) *The principle of prohibition of the abuse of a right or power*

1068. It is noteworthy that the concept of prohibition of abuse is itself subject to abuse, in particular by certain public authorities. The basic meaning of the concept of abuse of a right should be: the exercise of a human right or freedom for reasons or for the achievement of objectives not conforming to the *ratio legis* of the relevant freedom.

1069. Power in a democratic State should be understood in two directions: from the top downwards, which prevents anarchy; and from the bottom upwards, which is the will of the people democratically expressed.

6. OTHER BASIC PRINCIPLES

1070. There are other basic principles[458] implicit in article 29, paragraph 3, of the Universal Declaration of Human Rights and the corresponding articles of the International Covenants on Human Rights which should govern or be taken into consideration in connection with the imposition of limitations or restrictions on certain rights and freedoms of the individual. These principles are: reasonableness, good faith, equity,[459] the principle and right of self-determination, the principle of social solidarity (i.e. that the more economically advanced States and individuals should grant assistance to less developed States or economically or socially weaker individuals), the principle of friendly relations among peoples, and States; and the principle of the maintenance of world peace.

7. FINAL OBSERVATIONS

1071. The limitations or restrictions permitted under the Universal Declaration of Human Rights and the International Covenants on Human Rights must not be applied for any purpose other than those for which they have been prescribed.

1074. The courts should have the authority to declare null and void legal provisions because they restricted a basic right over and above the extent permitted under the constitution.

1075. National, local, regional and international institutions and bodies should have the power and obligation to examine *ex officio* whether limitations or restrictions provided by national law or the Universal Declaration and the International Covenants have been used for improper purposes, even if they have not expressly been invoked by the individual whose rights or freedoms were limited or restricted.

1076. The right to a writ of habeas corpus should be regarded as a constitutional right.

1077. The right of habeas corpus and the right of protection under the constitution must be recognized in cases of unlawful prosecution and detention of persons who have been put on trial or arrested, and in cases of illegal acts or omissions by officials or private individuals which restrict, eliminate or threaten to restrict the rights and freedoms of the individual.

1078. Accordingly the rights and freedoms of the individual, in order to be effectively protected from unlawful or arbitrary limitations or restrictions, should be guaranteed[460] and remedies[461] should be available to the individual for this protection at national, regional and international level.

1079. Peoples and Governments should be properly urged "to dedicate themselves to the principles enshrined in the Universal Declaration of Human Rights and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare".[462]

1080. Every individual is entitled to a social and international order in which the rights and freedoms set forth in the Universal Declaration can be fully realized.[463]

B. Recommendations

1081. In connection with limitations on the exercise of human rights, and in the light and spirit of the conclusions set forth in section A above, the Special Rapporteur proposes that the Sub-Commission on Prevention of Discrimination and Protection of Minorities should consider making the following recommendations to the Commission on Human Rights:

Elaboration of principles and guidelines governing United Nations standards of limitations and restrictions on certain human rights

1072. One of the most important principles in regard to basic rights and human freedoms should be that no basic right should be infringed in regard to its essential nature.

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[457] See chap. III, sect. H (paras. 390–391).

[458] See chap. III, sect. J (para. 394).

[459] The relationship between law and equity in modern times has never been clearly established, and the nature of equity remains shrouded in mystery. Much of the uncertainty which surrounds the meaning of equity is due to the fact that law must balance the interests of the individual against the interests of society, and each set of interests is differently affected by moral codes. See R. A. Newman, *Equity in the World's Legal Systems: A Comparative Study Dedicated to René Cassin* (Brussels, E. Bruylant, 1973) p. 15.

[460] For guarantees of the rights and freedoms of the individual, see chap. IV above.

[461] For a brief review of the remedies available to the individual, see chap. V above.

[462] Proclamation of Teheran, adopted by the International Conference on Human Rights at Teheran on 13 May 1968, last paragraph.

[463] Universal Declaration of Human Rights, art. 28.

1073. In principle, it is not possible for human rights to develop their full value and effectiveness until they are directly applicable in national laws and actionable by individuals in independent courts. This presupposes that legal or administrative measures should be examined by a court to determine whether they unlawfully limit basic rights.

(1) The Commission on Human Rights should recommend to the Economic and Social Council that it authorize the Sub-Commission to elaborate a declaratory resolution containing common principles and standards defining limitations and restrictions on the exercise of certain human rights.

Limits on the imposition of limitations or restrictions on certain human rights

(2) These United Nations standards should also establish the limits beyond which the adoption of further limitations or restrictions on the exercise of human rights by Governments of Member States should be considered illegal.

Harmonization of national legislation with United Nations standards of limitations and restrictions on certain human rights and freedoms

(3) National legislation should be brought into line with the United Nations standards of limitations and restrictions on certain human rights and freedoms.

Part three

PROTECTION OF HUMAN RIGHTS IN TIME OF PUBLIC EMERGENCY

Chapter I

INTRODUCTION

1. Part three of the present study analyses and interprets the complex provisions of article 4 of the International Covenant on Civil and Political Rights, which specifies the circumstances in which an emergency which arises would entitle a State party to derogate from its obligations under the Covenant, the conditions under which measures derogating from obligations may be taken and the kind of notifications that are to be submitted thereon.

2. The Special Rapporteur also examines the provisions of articles 6 and 7, article 8, paragraphs 1 and 2, and articles 11, 15, 16 and 18 of the International Covenant on Civil and Political Rights. These are the articles from which no derogation may be made (see article 4, paragraph 2, of the Covenant).

3. In examining and discussing the above-mentioned provisions, the relevant provisions of article 28, article 29, paragraphs 2 and 3, and article 30 of the Universal Declaration of Human Rights, article 4 of the International Covenant on Economic, Social and Cultural Rights and article 5 of both International Covenants have been taken into account.

4. This part of the study further assesses some basic standards which should be applied in emergency situations and which States Members of the United Nations should consider for the protection of the rights of the individual.

5. Accordingly, the present chapter contains a review of the preparatory work relating to article 4 of the International Covenant on Civil and Political Rights and comments on the article by Governments, specialized agencies and regional organizations. Chapter II deals with various aspects of the question of a state of public emergency, and chapter III contains conclusions and recommendations.

6. Particular reference is made to the various rights and principles which have been excluded from the scope of applicability of derogation clauses.

7. Among the principles which are examined and which should prevail under a state of emergency is the vital principle that though the emergency may bar the enforcement of certain rights temporarily, it does not abrogate the rule of law.

A. Preparatory work relating to article 4 of the International Covenant on Civil and Political Rights

8. The Commission on Human Rights examined various drafts and proposals relating to article 4 of the Covenant at its second (1947), fifth (1949), sixth (1950) and eighth (1952) sessions.[1] The third Committee considered the draft article at the eighteenth (1963) session of the General Assembly.[2]

1. Type of clause to be inserted in the International Covenant on Civil and Political Rights

9. Throughout the work of the Commission on Human Rights on article 4 there was general appreciation of the need to insert in the draft covenant a clause allowing States, under exceptional circumstances, to derogate from certain of its provisions. This trend materialized as article 4 of a draft "International Bill of Rights" submitted to the Commission at its first and second sessions. The proposed text, which was adopted by the Commission, read as follows:

> 1. In time of war or other national emergency, a State may take measures derogating from its obligations under article 2 above[3] to the extent strictly limited by the exigencies of the situation.
>
> 2. Any State party hereto availing itself of this right of derogation shall inform the Secretary-General of the United Nations fully of the measures which it has thus enacted and the reasons therefor. It shall also inform him as and when the measures cease to operate and the provisions of article 2 are being fully executed.[4]

10. It was argued in favour of the insertion of a clause providing for derogations from civil and political rights that a principle similar to that expressed in paragraph 1 was established in most national legislation. The second paragraph introduced a new principle: the responsibility of States towards the community of nations for any measures derogating from human rights and fundamental freedoms.

11. It was further emphasized that it was necessary to envisage various conditions of emergency in which States would be compelled to impose limitations upon certain human rights. In time of war, for example, States could not be strictly bound by obligations assumed under a convention unless the convention contained provisions to the contrary. There might also be

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[1] E/CN.4/SR.35, 88, 89, 126 and Corr. 1, 127, 195, 199, 330 and 331. See also the reports of the Commission on its fifth session (*Official Records of the Economic and Social Council, Ninth Session, Supplement No. 10* (E/1371), annex 1, art. 4, and annex II), sixth session (*ibid., Eleventh Session, Supplement No. 5* (E/1681), annexes I and II), seventh session (*ibid., Thirteenth Session, Supplement No. 9* (E/1992), annex I, art. 2, and annex III, sect. A, art. 2) and eighth session (*ibid., Fourteenth Session, Supplement No. 4* (E/2256), paras. 277–285 and annex I B, art. 3).

[2] *Official Records of the General Assembly, Eighteenth Session, Third Committee*, 1259th to 1262nd meetings.

[3] Article 2 of the draft provided that States are, by international law, under obligation to ensure, by various measures, the enjoyment of human rights and fundamental freedoms proclaimed in the draft.

[4] E/CN.4/21, p. 31 and E/CN.4/69.

instances of extraordinary peril or crisis, not in time of war, when derogation from obligations assumed under a convention would become essential for the safety of the people and the existence of the nation. Extraordinary situations of that kind would not fall within the scope of the limitations provided for in the specific substantive articles of the covenant, nor could they be adequately covered by a general limitations clause. A distinction had to be drawn between usual limitations upon human rights, which would enable States to become parties to the covenant without revising their domestic legislation, and the measures which Governments might be permitted to take in exceptional cases of national emergency. It was important that the States parties should not be left free to decide for themselves when and how they would exercise emergency powers, in order to guard against possible abuses by them in the exercise of such powers. Reference was made to various circumstances in the past when emergency powers had been invoked to suppress human rights and set up dictatorial régimes.[5]

12. Those who favoured a different trend considered unnecessary a clause allowing derogatory measures and supported the insertion of a general limitations clause, following the pattern of the proposals for the draft declaration of human rights, such as, for instance:

> The full exercise of these rights requires recognition of the rights of others and protection by law of the freedom, general welfare and security of all.[6]

or:

> The High Contracting Parties agree that a State party to this Covenant may take action reasonably necessary for the preservation of peace, order, or security, or the promotion of the general welfare. Such action by any State party to this Covenant must be imposed by or pursuant to law.[7]

13. They considered that a clause of this type was preferable, especially on the ground that the various limitations clauses contained in the substantive articles of the covenant, referring to national security, public security, or public order, would cover situations that might arise in time of war or national emergency. These specific limitations clauses had the advantage of appearing only in the articles in which they had been considered indispensable, whereas a general provision on emergency situations might be invoked in support of more far-reaching limitations.

14. There was a proposal to include in the covenant a provision enumerating the specific articles in respect of which limitations were allowed. The other articles would thus contain only substantive statements of the various rights and freedoms. The proposal read as follows:

> The rights and freedoms set forth in articles 9 (4), 11, 13 (2a), 16, 18 and 19 of this Covenant[8] shall be subject to such limitations as are pursuant to law and reasonably necessary for the protection of the rights and freedoms of others or for national security or for the general welfare.[9]

15. The purpose of the proposal, according to its author, was to avoid the great danger of a general clause which might open the way to abuses by Governments and thus nullify the meaning of the other articles. In addition, it was submitted that a provision of this type would have the advantage of reducing the number of articles and eliminating repetition.

16. A proposal was made to delete the draft article, on the grounds that it carried the unwarranted implication that the rights set forth in the covenant were absolute. While this was true for some rights (such as freedom from slavery, torture and mutilation), others must be regarded as relative. Specific limitations of various rights would be sufficient, even in time of war or other emergency, to ensure that a State could not invoke that emergency to justify derogating from its obligations. Those obligations would remain fully in force, and the only question would be whether the limitations imposed were reasonable under the circumstances. The opinion was further expressed that in any case the concepts of national security and public order set forth in the other articles of the covenant would sufficiently cover all cases that might arise in time of war or other calamity.

2. THE CONCEPT OF "PUBLIC EMERGENCY"

17. The initial formulation adopted by the Commission on Human Rights in order to specify under what circumstances a State is entitled to derogate from its obligations under the covenant was "In time of war or other public emergency".[10]

18. The main concern was to provide for a qualification of the kind of public emergency in which a State would be entitled to make derogations from the rights contained in the covenant, since without such a qualification the provision might give rise to abuse.

19. In a second version of the article it was, therefore, specified that only in a "public emergency threatening the interests of the people"[11] should derogations be allowed.

20. This phrase, it was said, would make it clear that the limitations should be put into effect as a measure of defence in case of aggression and other acts of war directed against the interests of the people. It was however pointed out that the interests of the people were endangered not only in time of war but also when States were in other extraordinary peril or in a state of crisis.

21. Another proposal was that the wording "public emergency threatening the security and general welfare of the people"[12] should be used. This wording was said to be preferable to the expression "interests of the people", which was considered too vague and susceptible of different interpretations.

22. The reference to "in time of war" was criticized

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[5] *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (part II), document A/2929, chap. V, para. 37.

[6] E/CN.4/37, p. 5, art. 16.

[7] E/CN.4/85, p. 59.

[8] Identification of the corresponding articles of the Covenant as finally adopted does not seem necessary for the purpose for which this proposal is quoted.

[9] E/CN.4/170/Add. 1.

[10] *Official Records of the Economic and Social Council, Sixth Session, Supplement No. 1* (E/600), annex B, part I, art. 4.

[11] *Ibid., Ninth Session, Supplement No. 10* (E/1371), annex I, art. 4.

[12] E/CN.4/SR.195, para. 80.

as inappropriate for the covenant, which should avoid giving any impression that it condoned war. Moreover, a reference to a state of war was considered as legally unnecessary, as war was covered by the concept of public emergency.

23. Another formulation was later adopted by the Commission, reading as follows: "In the case of a state of emergency officially proclaimed by the authorities or in the case of public disaster . . ."[13]

24. In addition to the arguments for eliminating the reference to the interests of the people and to war mentioned above, the inclusion of the requirement of an official proclamation of the state of emergency was considered as a further guarantee against arbitrary derogations from the provisions of the covenant. The additional term "public disaster" was proposed because it was felt that the term "public emergency" was too restrictive and did not cover natural disasters, which almost always justified a State in derogating from some at least of the rights recognized in the covenant.

25. Those opposed to this formula thought that the public emergency should be of such a magnitude as to threaten the life of the nation as a whole and not part thereof, as is the case when a natural disaster takes place. A proposal to specify that the public emergency should "threaten the life of the nation"[14] was adopted by the Commission, together with an amendment[15] to add after the words "the life of the nation" the phrase: "and the existence of which is officially proclaimed".

26. Thus, in the final text of the article adopted by the Commission, the only kind of emergency envisaged in article 4 is a "public emergency" which "threatens the life of the nation" and the existence of which is "officially proclaimed" by the State party concerned.

3. FINAL TEXT OF ARTICLE 4 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

27. Article 4 of the International Covenant on Civil and Political Rights, as finally elaborated and approved, reads as follows:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

B. Comments by Governments relating to article 4 of the International Covenant on Civil and Political Rights

28. The Secretary-General, on behalf of the Special Rapporteur, transmitted to Governments a questionnaire in connection with the present study. The following information relating to article 4 of the International Covenant on Civil and Political Rights is extracted from the replies of Governments:[16]

GERMANY, FEDERAL REPUBLIC OF

[3 June 1976]

(1) The Federal Republic of Germany is a contracting party to the International Covenant on Civil and Political Rights and the European Convention on Human Rights, both of which contain public emergency articles (cf. article 4 of the Covenant and article 15 of the European Convention).

(2) The emergency measures permissible under the Basic Law do not exceed those in the public emergency articles of the International Covenants (Basic Law, art. 12a and art. 115c, para. 2).

(3) In a defensive emergency, too, the constitutional position and the fulfilment of the constitutional functions of the Federal Constitutional Court and its judges may not be impaired (Basic Law, art. 115g.).

HUNGARY

[21 July 1976]

(1) The Constitution of the Hungarian People's Republic contains no express provisions on limitations on the exercise of human rights and freedoms. Such limitations are to be found in the following legislative provisions: Act II of 1972 on Health, paras. 19 and 20; Act I of 1976 on National Defence, art. 55; and Decree No. 21/1953/V.15 of the Council of Ministers on the Regulation of Matters Relating to Animal Health, imposing limitations on the freedom of movement of the population in the event of epizooty.

(2) Where there exist reasonable grounds defined by law, such limitation may be imposed by the organs of State administration vested with powers of decision in an emergency situation and in the interest of the community.

ISRAEL

[5 November 1975]

(1) A major element of the theory of limitations on human rights is the rule of law principle even when a state of emergency exists. In a case in 1948, of the detention of an Arab under Defence Emergency Regulations by the Military Commander, on grounds of security, the High Court, on a habeas corpus application, ordered the release of the detainee because the detention was not in the circumstances open to the review made available by the Regulations, the necessary reviewing tribunal not having been as yet appointed (*Al-Karboutly* v. *Minister of Defence* (1948) 1. *P.E.* 97). The Court said:

> "The authorities are subject to the law like the citizens of the State. The rule of law is one of the firm foundations of every State. It would be greatly detrimental both to the public and to the State if the authorities were to exercise, even temporarily, a power given to them by the Legislature, ignoring the safeguards imposed by the Legislature upon such exercise. It is true that the security of the State which makes the detention of a person necessary is not less important than the need to protect the citizen's liberties but where both of these objects can be attained, neither should be ignored."

(2) From the very beginning of the existence of the State, emergency powers have been subject to close scrutiny by the courts. In another case of release of a detainee (*El-Khoury* v. *Chief of Staff* (1949) (3) *P.E.* 271 (New Series)), the Court said:

> "The principle is that every person in this country has the right to freedom and the authorities have no right to detain him without a judge's warrant, save in cases provided by law. It is unnecessary to stress that in allowing a Military Commander the power of

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[13] *Official Records of the Economic and Social Council, Eleventh Session, Supplement No. 5* (E/1681), annex I, art. 2. (This wording was proposed in an amendment, which was contained in document E/CN.4/365, p. 20.)

[14] *Official Records of the Economic and Social Council, Thirteenth Session, Supplement No. 9* (E/1992), annex III, art. 2.

[15] *Ibid., Fourteenth Session, Supplement No. 4* (E/2256), para. 280 and annex I, sect. B, art. 3.

[16] The dates of the replies from Governments are shown in parentheses after the names of the countries, which are listed in alphabetical order.

detention, the Palestinian legislature gravely limited this fundamental right and did so only when convinced of the justification of such measure by the state of emergency."

(3) The rule of law principle applies not only to the executing authorities but also to the judiciary itself. In *Shalit* v. *Minister of Interior* (1969) 23. *P.D.* (II) 477, 600, the Supreme Court observed:

> "The principle of the rule of law means that a judge ought to refrain as much as possible from giving preference to his private views as to the requirements of justice in a particular case, lest he give rise to the suspicion that instead of interpreting the law he has adjudicated arbitrarily."

(4) As can be seen from the El-Khoury case, a further aspect is the principle of legality, which may be formulated as follows: everyone is presumptively free and no restrictions on this liberty will be imposed except under law. This principle is contained in section 1 of the Draft Basic Law: Human Rights.

(5) In this regard, judicial review goes further than mere formal application of the principle of legality. Where an accused had been detained for eight months on a serious charge, his trial having been postponed immediately after the charge was made and bail having been refused by the lower court for fear of interference by the accused with witnesses, the Court ruled that such a course "even if not contrary to the letter of the law, certainly negates the spirit of the law". The accused was ordered to be released on bail unless trial was proceeded with at once (*Amiel* v. *State of Israel* (1970) 24 *P.D.* (II 113)).

(6) The principle of "permissibility", i.e., that everyone has the right and the faculty to do everything not expressly forbidden or limited by law, prevailed in a case involving the freedom of employment (*Bejerano* v. *Minister of Police* (1949) *P.D.* 80). The Court said:

> "It is a basic principle that everyone has an inherent, natural right to pursue the calling or profession of his choice, unless such calling or profession is forbidden by law. Wherever the law imposes limitations or conditions precedent on the exercise of certain professions, no one can pursue them unless he has first complied with such conditions precedent . . . The right is not written in the Statute Book but arises from the natural right of every person to look for sources of income and to find an occupation from which to derive his livelihood."

MAURITIUS

[*20 February 1976*]

(1) With respect to the Emergency Powers Ordinance (5/68), particularly section 3 thereof, paragraphs 10, 13 and 14 cover matters found in section 47 of the Constitution (power of Parliament to alter the Constitution). Only the legislature can impose limitations of human rights and technically it can make whatever derogations from human rights and freedoms which it thinks fit. Section 18 of the Constitution in fact provides for certain derogations from fundamental rights and freedoms in a period of emergency.

(2) With respect to paragraph 20, in *Police* v. *Moorba*, MR p. 199, it was held that sections 9(1) and (3) of the Public Order Act 1970 were not *ultra vires* section 13 of the Constitution, which deals with freedom of assembly and association. The Court also held however that a law giving the Commissioner of Police an unfettered right to restrict freedom of assembly would be unconstitutional.

(3) In (*Viraswamy* v. *Commissioner of Police*, 1972 MR 255, it was held that solitary confinement and the physical and mental discomfort caused by such confinement did not constitute torture or inhuman treatment within the meaning of section 7(1) of the Constitution.

(4) In *Duval* v. *Commissioner of Police*, (1974) S.C.R. No. 17793, the plaintiff applied for redress under S 17 of the Constitution alleging that the provisions of sections 12, 13 and 16 of the Constitution had been and were likely to be contravened in relation to him by the defendant. He sought from the Court a declaration that the defendant was wrong to have interfered with his constitutional rights and an order restraining the latter from interfering with those rights in future.

(5) It was held that freedom of expression is subject to certain restrictions which may be imposed in the interests of public safety or public order provided these restrictions are reasonably justifiable in a democratic society. By imposing a pre-censorship upon the plaintiff's paper, the defendant had restricted his freedom of expression. It was held, however, that regulation 2(1) of the Emergency Powers (Control of the Press) Regulations, 1971, was made in the interests of public safety or public order and was reasonably justifiable in a democratic society and therefore valid.

(6) It was held further that regulation 2(1) quoted above does not give an unfettered discretion to the Commissioner of Police: it merely empowers the latter, during a period of public emergency, to take action which will have the effect of restricting a fundamental freedom of an individual, provided that he is satisfied that the freedom, if not restricted, would be prejudicial to public safety or public order. The reasonableness of his decision can further be questioned in Court.

(7) It was held also, on the facts, that the plaintiff had failed to prove that the defendant had contravened section 16 of the Constitution (Protection against discrimination).

(8) It was held—approving the decision in *Melin* v. *The Queen* (1973) S.C.R. 2096—that regulation 4 of the Emergency Powers (Control of Gatherings) Regulations, 1971, which deals with all gatherings generally, "is a restriction on the right of assembly imposed in the interests of public order".

(9) It was held also that regulation 3(a), which deals exclusively with public gatherings, does not give the Commissioner of Police an unfettered discretion to control the right of assembly.

PAKISTAN

[*11 May 1976*]

(1) Under article 232 of the Constitution, if the President is satisfied that a grave emergency exists in which the security of Pakistan is threatened by war or external aggression or internal disturbance of a high magnitude, he may, under article 233, make any law or take any executive action which he may not make or take in view of articles 15, 16, 17, 18, 19 and 24 of the Constitution. He may also, while a proclamation of emergency is in force, declare that the right to move any court for the enforcement of such fundamental rights as may be specified by him remain suspended. The suspension of rights during emergency has been considered valid by the courts.

(2) From the above it is clear that only the rights relating to movement, assembly, association, trade, business and profession, speech and property may be suspended. The other rights, such as those relating to security of person, safeguards against detention, prohibition of slavery and forced labour, protection against retrospective punishment and against double punishment and self-incrimination, the inviolability and dignity of man and safeguard to profess religion and manage religious institutions, equality of citizens, non-discrimination in respect of access to public places, etc., cannot be suspended by the President even during the emergency. These rights can only be temporarily suspended or permanently taken away by the process of amending the Constitution.

(3) The Constitution contains a basic provision that no law may impair these rights. No law, under article 8 of the Constitution, can be made which takes away or abridges the fundamental rights which have been guaranteed in the Constitution. If any law is so made it will be void to the extent that it contravenes this provision. However, this provision is not applicable in relation to the laws relating to members of the armed forces or the forces which are charged with the maintenance of public order. Some laws made prior to the enforcement of the new Constitution which were considered essential for the welfare of the people and which, it was considered, may come in conflict with this provision, have been protected from being declared void due to repugnance with the rights. The basic principles and norms which have been incorporated in the Constitution as fundamental rights in different articles relate to the equality of man, the rule of law, and non-discrimination.

(4) The legislature is required to act within the limits laid down in the Constitution. The position is the same with regard to the power of the executive and administrative authorities. As pointed out earlier, the courts have been given what is called the power of judicial review. In one case, the Supreme Court of Pakistan observed it is surely within judicial review to examine, both as to the reasonableness of the law itself and as to the reasonableness of the mode of application of the restriction, whether such mode be prescribed by the statute or not. The citizen is entitled to approach the Court for a declaration that his freedom has been unreasonably restrained. Further, the courts cannot regard themselves as satisfied that a citizen's freedom has been subjected to reasonable restriction unless it is proved to their satisfaction not only that the grounds of the restrictions as stated by the law are reasonable in themselves, but that they have been applied reasonably as required by the Constitution. Necessary provision on this behalf is contained in article 8 and article

199 of the Constitution. Individuals can challenge the authorities that they have acted in any matter arbitrarily under article 199 of the Constitution.

(5) "National security" has not been defined but it is equal to the security of the State as a whole. It will cover any activity which will be prejudicial to the very existence of the State. In article 232 of the Constitution it is stated that a grave emergency is an emergency in which the security of Pakistan, or any part thereof, is threatened by war or external aggression and by internal disturbance of a very high magnitude. War, rebellion, insurrection etc., which are prejudicial to the security of the State, would come under the term "national security". Riots and ordinary disturbances of the peace are not covered by the term; they are covered by the term "public order".

(6) Pakistan has not entered any international instrument limiting its powers to act according to the circumstances during a "public emergency" which threatens the life of the nation. The Constitution of Pakistan regulates this matter, and the rights which can be suspended have already been indicated above [see para. (2)].

SENEGAL

[28 June 1976]

(1) Article 47 of the Senegalese Constitution of 8 March 1963 confers exceptional powers on the President of the Republic in cases of disorder, to enable him to deal with any crisis which threatens the life of the nation.

(2) When he acts under the provisions of article 47, "the President of the Republic may, after informing the nation by a message, take any measures needed to restore the normal functioning of the public authorities and to protect the nation, except a revision of the Constitution".

(3) In addition, article 58 of the Constitution provides that "a state of siege or state of emergency shall be decreed by the President of the Republic. The National Assembly shall automatically meet as of right, if it is not in session. The decree proclaiming the state of siege or state of emergency shall cease to be in force after twelve days, unless the National Assembly, at the request of the President of the Republic, has authorized its prolongation".

THAILAND

[22 September 1975]

The following legal provisions prevent derogations from human rights:

Section 312 of the Penal Code:

> "Slavery or causing any person to be in a position similar to a slave is liable to punishment or imprisonment—And torturing or any inhuman treatment of any person is deemed a crime."

Section 35 of the Constitution:

> "Any statement of a person obtained by torture, threat, coercion, or any act which causes such statement to be made involuntarily shall be inadmissible evidence."

VENEZUELA

[29 July 1976]

Another way of limiting or restricting the exercise of human rights is by means of a decree suspending guarantees, when the country is considered to be in a state of emergency. The constitutional guarantees which may not be suspended are: the right to life; the right not to be sentenced to perpetual or infamous punishment; and the right not to be held incommunicado or subjected to torture or other treatment which causes physical or moral suffering.

C. Comments by specialized agencies relating to article 4 of the International Covenant on Civil and Political Rights

29. The Secretary-General, on behalf of the Special Rapporteur, transmitted to specialized agencies a questionnaire in connection with the present study. The following information relating to article 4 of the International Covenant on Civil and Political Rights was received in response to the questionnaire:[17]

INTERNATIONAL LABOUR ORGANISATION (ILO)

[17 September 1975]

Work or services exacted in cases of emergency (Convention No. 29, art. 2, para. 2 (d))

(1) The Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts)[18] has consistently insisted on the observance of all the requirements of this exception to the definition of the term "forced or compulsory labour", i.e., there must be a genuine and present emergency endangering the existence or well-being of the whole or part of the community of the kind illustrated in the wording of the Convention; the power to exact labour must be limited to the period of the emergency; and the compulsory labour imposed must be strictly necessary to deal with the exigencies of the emergency situation (see, in particular, Report of the Committee of Experts, 1962, part three, paras. 59–61, 63 and 85–86; Report of the Committee of Experts, 1968, part three, paras. 39 and 51–54).

(2) Examples of legislation related to emergencies but worded in terms permitting the call-up of labour in a wider range of circumstances include the following:

(*a*) Legislation permitting the requisition of the services of the employees of an undertaking or service whose efficiency is endangered "when circumstances so demand" (Report of the Committee of Experts, 1962, p. 53);

(*b*) Legislation permitting the call-up of civilians to satisfy the needs of national defence, which was defined as comprising all measures taken by the State to protect the vital interests of the nation from substantial interference and disturbance (Report of the Committee of Experts, 1968, p. 50);

(*c*) Legislation permitting the call-up of civilians "to meet abnormal situations of any kind liable to impair or to disturb the economic or social life of the country" (Report of the Committee of Experts, 1970, p. 64);

(*d*) Legislation permitting compulsory labour in case of shortage of manpower for carrying out important State work (Report of the Committee of Experts, 1971, p. 78).

(3) As regards emergency situations, the Committee of Experts, in examining the application of the provision of the Abolition of Forced Labour Convention, 1957 (No. 105) prohibiting the use of forced or compulsory labour as a punishment for political or ideological views, has recognized that freedom of expression and other rights relevant to this provision of the Convention may during exceptional periods be subjected to more general restrictions. It has emphasized that recourse to exceptional powers should be had only in strict cases of emergency, and that the nature and duration of the measures taken should be limited to what is strictly required by the exigencies of the situation (Report of the Committee of Experts, 1968, part three, para. 92).

(4) The Governing Body Committee on Freedom of Association has had to consider the effect of emergency situations on trade union rights.[19]

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[17] The replies of the specialized agencies were received on the dates shown in parentheses following the name of the agency.

[18] The Report of the Committee of Experts on the Application of Conventions and Recommendations is published each year as Report III (part 4) to the International Labour Conference.

[19] The following extracts from *Freedom of Association: Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO*, 2nd ed. (Geneva, International Labour Office, 1976) illustrate the Committee's practice on this point:

> "473. In cases where the Committee has considered complaints concerning alleged infringements of trade union rights committed under a state of emergency or a state of siege or under the terms of an Internal Security Act, it has always expressed the opinion that it was not competent to come to a decision on the need or the advisability of such legislation, which is a question purely political in character. The Committee was, however, of the opinion that it should consider the repercussions which such legislation might have on the free exercise of trade union rights.
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> First Report, Case No. 24, paras. 84 and 85; Second Report, Case No. 21, para. 24; Third Report, Case No. 17, para. 51; Fourth Report, Case No. 5, para. 44; Case no. 30, para. 145; Case No. 38, para. 179; Sixth Report,Case No. 40, para. 466; Case No. 46, paras. 657 *et seq.*; Case No. 49, para. 800; Case No. 2, para. 1012; Seventh Report, Case No. 56, para. 68; 13th Report, Case No. 62, para. 73; 25th Report, Case No. 140

(5) The Commission of Inquiry appointed in 1969 under article 26 of the ILO Constitution to examine complaints concerning the observance by Greece of Conventions Nos. 87 and 98 had to consider the defence put forward by the Government of Greece that it was relieved from the obligation of compliance with the Convention by reason of the state of emergency which led to the proclamation of siege law. The Commission of Inquiry, which concluded that this defence was not justified, dealt with this issue in chapter 5, "International obligations and the state of emergency", of its report.

(6) This part of the report reads as follows:[20]

"102. The Commission now proposes to set out the material which it has received, and on the basis of which it will proceed to determine to what extent there had been, as alleged by the complainants, breaches of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), ratified by Greece.

"103. For this purpose it appeared to the Commission in the light of its work that the narrative of the events could conveniently be divided into three main periods: the period from 21 April 1967, the date of the Revolution, to May 1968, when articles 10 and 11 of the Constitution of 1952 concerning the right of assembly and association, which had been suspended the day after the new regime took over, were brought back into force; the period from May 1968 to the end of that year, when the new Constitution of 1968 was adopted and articles 18 and 19 thereof, also concerning the right of assembly and association, were put into force for members of recognized occupational organisations; and lastly, the current period which is marked by the existence of new legislation of a permanent character as regards trade union matters. The periods mentioned above can in no way be considered to be strictly separate; certain facts which characterised one given period sometimes reappear in the others, some measures taken in the first period continued to have effects which lasted throughout the other periods, and finally, certain common features are apparent in all three periods.

"104. Before embarking on this narrative of events, the Commission considers that it would be convenient to examine the important question of international law implicit in the defences raised by the Government of Greece. It will be appreciated from the statement of these defences in Chapter 2 of this report that many of them are twofold in character. In the first place, there is a denial that the acts complained of were committed or that, if committed, they were in breach of the Conventions; this is best examined after the narrative of events has been set out. In the second place, the Government contends that it was relieved from the obligation of compliance with the Conventions by reason of the state of emergency[1] which led to the proclamation of siege law in April 1967. This raises a question of international law which the Commission will consider forthwith.

"105. The Government representative put the argument as follows[2]: although it had ratified Convention No. 87 on 30 March 1962, and 'in particular, had assumed an obligation under Article 8 of Convention No. 87 to ensure that the law of the land did not impair the guarantees provided for in the Convention, Greece had not undertaken to repeal article 91 of the 1952 Constitution relating to the state of emergency.[3] The Conventions did not, and could not, require the repeal of such provisions, which were common in national Constitutions. The state of emergency was as familiar a concept in public law as that of *force majeure* in private law. . . . Granted that the law must conform with the Constitution, and that the Government was the sole judge of the need to proclaim a state of emergency, the safeguards required by the Conventions were clearly not inviolate, and their suspension, however regrettable, had been in no way arbitrary'.

"106. The contention set out in the preceding paragraph is based upon the two assumptions stated in it, the first being that 'the law' (which the Commission understands to mean the proclamation of siege law) must conform with the Constitution; and the second being that, if there is such conformity, the Government becomes 'the sole judge of the need to proclaim a state of emergency'. These two assumptions are distinct.

"107. As to the first, the Government did not contend that the proclamation of siege law was strictly in accordance with the text of the Constitution. It admitted that two constitutional steps, prerequisite to the validity of the declaration of the state of siege, were not taken. 'These are two omissions', the representative of the Ministers of Labour and Justice told the Commission, 'which, on the legal level, indicate the establishment of a new authority which set up a revolutionary regime and created a new legal situation going beyond the normal constitutional framework'.

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para. 264; 27th Report, Case No. 157, para. 325; 30th Report, Case No. 172, para. 202; Case No. 174, para. 231; 33rd Report, Case No. 184, para. 94; 36th Report, Case No. 192, para. 102; 41st Report, Case No. 199, para. 65; 56th Report, Case No. 216, para. 157; 78th Report, Case No. 364, para. 82; 89th Report, Case No. 452, para. 112; 108th Report, Cases Nos. 451, 456 and 526, para. 141; 110th Report, Case No. 561, para. 218; 139th Report, Case No. 765, para. 566.

"474. Measures of a purely political nature, such as a state of siege, are matters which are outside the Committee's terms of reference except in so far as they may have an impact on trade union rights

103rd Report, Case No. 514, para. 215; 137th Report, Case No. 687, para. 94

"475. In the cases in which it had to examine allegations against countries which were in a state of political crisis or had just passed through grave disturbances (civil war, revolution, etc.), the Committee considered it necessary, when examining the various measures taken by the governments, including some against trade union organizations, to have regard to such exceptional circumstances when examining the merits of the allegations.

Third Report, Case No. 1, para. 19; Fourth Report, Case No. 30, para 149; Sixth Report, Case No. 40, para. 561; 12th Report, Case No. 16, para. 383; 16th Report, Case No. 112, para. 86; 17th Report, Case No. 109, para 118; 19th Report, Case No. 121, para. 169; 24th Report, Case No. 121, para. 69; 25th Report, Case No. 140, para. 261; Case No. 136, para. 144; 33rd Report, Case No. 184, para. 94; 78th Report, Case No. 364, para. 82.

"476. In cases where there is a state of siege, it is desirable that the government, in its relations with occupational organizations and their representatives, should rely on measures provided for in ordinary law rather than on emergency measures which are liable by their very nature to involve certain restrictions on fundamental rights.

56th Report, Case No. 216, para. 157; 90th Report, Cases Nos. 282 and 401, para. 93.

"477. Measures taken in a state of emergency may constitute serious interference by the authorities in trade union affairs, contrary to Article 3 of Convention No. 87, except where such measures are necessary because the organizations concerned have diverged from their trade union objectives and have defied the law. In any case such measures should be accompanied by adequate judicial guarantees which may be invoked with reasonable facility.

120th Report, Cases Nos. 572, 581, 586, 596, 610 and 620, para. 43; 131st Report, Cases Nos. 626 and 659, para. 113."

[20] International Labour Office, *Official Bulletin*, Special Supplement, vol. LIV, 1971, No. 2.

"[1] By the expression 'state of emergency' the Commission understood the Government to mean, a 'manifest threat to public order and to the security of the country from internal dangers,' the phraseology used in article 91 of the Constitution of 1952; the Commission uses the term in the same sense.

"[2] See statement of the Government representative to the Governing Body of the ILO, Appendix IV.

"[3] The full text of this article is as follows:

'The King may, on the recommendation of the Council of Ministers in case of a state of war or mobilisation due to external dangers or of a serious disturbance of or manifest threat to public order and to the security of the country from internal dangers, suspend by Royal Decree throughout the country or in part thereof the operation of articles 5, 6, 8, 10, 11, 12, 14, 20, 95 and 97 of the Constitution or certain of these articles and, by putting into effect the law on "state of siege" as this law may apply on each occasion, establish extraordinary tribunals. This law may not be modified in the course of the work of the Parliament summoned for its application. All measures taken under authority of the present article shall without fail be announced to Parliament for approval or abrogation at its first meeting after their promulgation. If these measures be taken in the absence of Parliament the same Royal Decree shall, under penalty of nullity, summon Parliament to meet within ten days even though its term ended or it be dissolved; in either case Parliament shall decide on maintaining or abrogating the said decree.

'The parliamentary immunity provided for in article 63 shall enter into effect as from publication of the said Royal Decree.

"108. The Commission, however, finds it unnecessary to examine the constitutional validity of the Government's acts. The Commission understands perfectly the argument that conformity with the Constitution would make the Government in the eyes of the Greek law the sole judge of the need to proclaim a state of emergency. But it has not that effect in international law. The Commission takes the view that it is an accepted principle of international law that a State cannot rely on the terms of its national law, or otherwise invoke the concept of national sovereignty, to justify non-performance of an international obligation. Any doubt concerning the extent of such obligation must be determined by exclusive reference to the relevant principles of international law, whether made express by the parties to a treaty or derived from another source of international law, in particular, international custom and general principles of law.

"109. The relevant provisions of international law applicable in the present case are contained in Conventions Nos. 87 and 98, both of which have been ratified by Greece. In neither of these Conventions is there any provision allowing the possibility of basing a plea of emergency, as an exception to the obligations arising under the Conventions, on the terms thereof.

"110. The position of pleas of emergency or necessity in international custom may be said to correspond essentially, within the peculiar framework of the international community, to the place given to pleas of *force majeure* or legitimate self-defence in national systems of law. A plea of *force majeure* generally requires a showing of irresistible force of circumstances. A plea of legitimate self-defence requires a showing both of imminent danger and of a proportionate relationship between the danger and the measures adopted for defence. Both the general principle of law derived from national practice and international custom are based on the assumption that the non-performance of a legal duty can be justified only where there is impossibility of proceeding by any other method than the one contrary to law. It must also be shown that the action sought to be justified under the plea is limited, both in extent and in time, to what is immediately necessary.

"111. There is a further consideration. All the main legal systems accept in some form the principle that pleas of justification on grounds such as self-defence are subject to legal review. If a plea of emergency is to be treated in international law as a legal concept there similarly has to be appraisal by an impartial authority at the international level.[4] It is for this reason that international tribunals and supervisory organs, when seized of such a plea, have invariably made an independent determination of whether the circumstances justified the claim, and have not allowed the State concerned to be sole judge of the issue.[5]

"112. With regard to the whole question of the circumstances said to constitute a state of emergency the Commission received insufficient information from the Greek Government, which took the attitude that it was a matter to be decided solely by the Government and not by any tribunal. In the examination by the Commission of the evidence and information relating to the events of 1967, nothing emerged which would enable the Commission to conclude that there existed in Greece in April 1967 a state of emergency, or such exceptional conditions as would justify temporary non-compliance with the Conventions. Accordingly the Commission rejects the plea of the Government that it was entitled to derogate from the Conventions in the circumstances which prevailed in Greece in April 1967."

UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO)

[3 September 1975]

(1) Article 4, paragraph 2, of the Covenant is related to the rights from which no derogation is permitted. The same provisions are contained in article 15 of the European Convention, article 27 of the Inter-American Convention and article 3 in each of the four Geneva Conventions. Rights from which no derogations are permitted in all these instruments are called, in the chapter of UNESCO's manual which deals with the question, "the indestructible core of human rights", and the standards are regarded as having the nature of *jus cogens*. One question which arises in this context should be considered in the report: how should one interpret a clause authorizing limitations on a human right which is part of an article from which no derogations are possible? For example, article 4 of the Covenant states that there can be no derogation from article 18 in time of public emergency, yet article 18 itself contains a paragraph authorizing limitations in the general interest. Here again there is a problem of interpretation.

(2) It is interesting that the relevant questionnaire drafted by the Special Rapporteur raised the issue of emergency situations other than conflicts (insurrection, civil war, international war), particularly underdevelopment and natural catastrophies.

D. Comments by regional organizations relating to article 4 of the International Covenant on Civil and Political Rights

30. The following comments, dated 12 January 1976, were received by the Special Rapporteur from the Council of Europe:

(1) Article 15 of the European Convention on Human Rights reads as follows:

"(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

"(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7, shall be made under this provision.

"(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

(2) The Commission and the Court of Human Rights provided for by the European Convention on Human Rights have, in a series of cases heard during the past 20 years, interpreted the requirements of the above-mentioned article 15 of the European Convention with considerable rigour.

(3) As early as 1956, in the first Cyprus case, the Commission considered that it was competent to decide whether a public emergency existed and whether the measures covered by article 15 had been taken to the extent strictly required by the exigencies of the situation. On this second point, however, it added that the Government concerned must retain a certain measure of discretion.[21]

(4) The Commission reiterated this opinion in the Lawless case and the Court confirmed it in substance in its ruling handed down on this case in 1961. The Commission's report contains two declarations of principle: first, it declared its opinion that a "public emergency threatening the life of the nation" means an exceptional situation of crisis or emergency which affects the whole population, and not only certain groups, and constitutes a threat to the organized life of the community of which the State is composed; and, second, it reaffirmed its opinion that a certain latitude—a certain margin of appreciation—must be left to the Government in determining whether there exists a public emergency calling for exceptional measures on its part, but that at the same time, the Commission has

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'The effect of the above-mentioned Royal Decrees shall not, in the case of war, be extended beyond the end thereof; in all other cases their effect shall *ipso facto* terminate after two months from their promulgation unless in the meantime it be extended again with Parliament's permission'.

"[4] See Oppenheim's *International Law* (ed. by Lauterpacht) eighth edition, Vol. I (1955), pp. 298–299; Giraud, *La théorie de la légitime défense*, in Académie de droit international, Recueil des Cours, 1934, Vol. III, pp. 691–860; Jessup, *A Modern Law of Nations* (1948), p. 165.

"[5] See Lawless v. Government of Republic of Ireland, *I.L.R.*, Vol. 31, pp. 290 et seq; Rousseau, *Principes généraux du droit international public* (1944), Vol. I, pp. 365–367; *Publications of the P.C.I.J.*, Series A, Nos. 20a and 21."

[21] *Yearbook of the European Convention on Human Rights, 1958–1959*, Application No. 176/56, p. 176.

the power and the duty, under article 15, to examine the evaluation made by the Government and to pronounce on it. It concluded therefrom that the requirements stipulated in article 15 had been met.

(5) The Court reached the same conclusion by reasoning which was similar in substance.

(6) In its opinion, it is for the Court to ascertain whether the requirements set forth in article 15 for the exercise of the exceptional right of derogation were met.[22]

(7) Consequently, the Court proceeded to examine the facts which might have constituted a public emergency threatening the life of the nation. It defined such a public emergency as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed".[23] Then, reviewing the facts on which the Irish Government had based its case, the Court concluded that the Government had been justified in declaring that such an emergency existed. We find here, in a slightly different form, the idea that the Government has a certain margin of appreciation in determining whether an emergency exists.

(8) The definition given by the Court was followed by the Commission in the Greek case.[24] Here again, the Commission sought to determine whether a public emergency had existed in Greece, by examining the facts which the Greek Government itself had adduced as constituting such an emergency. Two aspects of the Commission's report clearly illustrate the rigorous nature of the conditions to be met. First, in referring to the Government's "margin of appreciation", the Commission did not consider it advisable to ascertain whether the Greek Government had "reasonably deduced" that an emergency existed; it examined the question whether such an emergency had existed in fact. Secondly, the Commission held that in that case, the burden of proof lay upon the respondent Government.

(9) The provision that the Secretary General should be informed (art. 15, para. 3) was also interpreted strictly by the majority of the Commission, which expressed the opinion that the Greek Government had not fully met that requirement since it had not furnished the texts of a number of legislative measures or the Constitution of 1968, had not provided information on the administrative measures and had not communicated the reasons for the measures of derogation until four months after they had been taken.[25]

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[22] *Ibid., 1961*, p. 472.

[23] *Ibid.*, pp. 473–475.

[24] *Ibid., 1969, The Greek Case*, pp. 71–72.

[25] *Ibid.*, pp. 42–43.

Chapter II

STATE OF PUBLIC EMERGENCY

A. General view

31. Almost all legal systems provide for derogation from constitutional guarantees in time of war[26] or other emergency[27].

32. The legal institution by virtue of which such derogation is effected is defined as "public emergency",[28] "public danger, or other emergency",[29] "state of siege" or "discretionary powers", "suspension of constitutional guarantees"[30] or "state of exception".[31] "Public emergency threatening the life of the nation" means an exceptional situation of crisis or emergency which affects the whole population, not only certain groups, and constitutes a threat to the organized life of the community of which the State is composed.[32]

33. As has already been mentioned in parts one and two of the present study, general principles of law recognized by the world community and customary rules of international law came to be codified in humanitarian conventions and were subsequently expanded in multilateral agreements taking the form of international bills of human rights.

34. In these international instruments on human rights there are provisions to the effect that the exercise of rights and freedoms protected therein can be limited or restricted by States on specific grounds.[33]

35. Likewise, certain of the international instruments on human rights contain express provisions spelling out that States may interfere with nationally and internationally protected human rights in time of emergency.[34]

36. It is often precisely through action of this kind that the rights and freedoms of the individual are violated.[35]

37. This is one of the basic reasons why states of emergency and their effects need to be scrutinized by the organs charged with the implementation of the relevant international instruments on human rights.

B. Requirements for the existence of a public emergency

38. Article 4, paragraph 1, of the International Covenant on Civil and Political Rights (hereinafter, the Covenant) expressly provides that:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

39. Thus, this provision of article 4 of the Covenant regulates the power to declare a state of public emergency only in so far as it is used to effect exceptional infringements of human rights and fundamental freedoms.

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[26] See, for example, Constitution of Colombia of 1970, art. 121; Constitution of Greece of 1975, art. 48.

[27] For example, Constitution of Nigeria of 1979, art. 41; Constitution of Portugal of 1976, art. 19; Constitution of Spain of 1978, art. 116.

[28] For example, International Covenant on Civil and Political Rights, art. 41; European Convention on Human Rights, art. 15.

[29] For example, American Convention on Human Rights, art. 27.

[30] See, *inter alia*, D. H. Martins, "La protección de los derechos humanos frente a la suspensión de las garantías constitucionales o 'Estado de Sitio' ", in *The Organization of American States and Human Rights, 1960–1967* (Washington, D. C., General Secretariat of OAS, 1972), part II, pp. 136 and 139.

[31] See "Reports on civil and political rights for the period 1 July 1971–30 June 1977 received from Governments under Economic and Social Council resolution 1074 C (XXXIX)" (E/CN.4/1300 of 28 August 1978), pp. 7, 13, 43, 50 and 64; "Report of the *Ad Hoc* Working Group established under resolution 8 (XXXI) of the Commission on Human Rights to inquire into the present situation of human rights in Chile" (E/CN.4/1188 of 4 February 1976), p. 13; "Report of the *Ad Hoc* Working Group established under resolution 8 (XXXI) of the Commission on Human Rights to inquire into the present situation of human rights in Chile" (E/CN.4/1310 of 1 February 1979), pp. 13–16; *Seminar on the Effective Realization of Civil and Political Rights at the National Level*, Kingston, Jamaica, 25 April-8 May 1967 (ST/TAO/HR/29), paras. 155 and 158–159.

[32] According to Harry E. Groves, three types of emergency stand out in modern times: (*a*) the actual conduct of war or preparations to meet its imminent occurrence; (*b*) the threat or presence of internal subversion; and (*c*) the emergency caused by a breakdown, or potential breakdown, in the economy. See H. E. Groves, "Emergency powers", *Journal of the International Commission of Jurists* (Geneva), vol. III, No. 2 (Winter 1961), p. 1.

[33] See, for example, Universal Declaration of Human Rights, art. 29, para. 2; International Covenant on Economic, Social and Cultural Rights, art. 4; International Covenant on Civil and Political Rights, arts. 12, 14, 18, 19, 21 and 22. See also part two, chap. I, above.

[34] For example, International Covenant on Civil and Political Rights, art. 4; European Convention on Human Rights, art. 15; American Convention on Human Rights, art. 27.

[35] Sir Humphrey Waldock, "Human rights in contemporary international law and the significance of the European Convention", in *The European Convention on Human Rights*, British Institute of International and Comparative Law, International Law Series, No. 5 (London, 1965), p. 16.

40. Consequently, the question that arises is whether there exists derogation from human rights[36] in the absence of any threat to the life of the nation, not whether a state of emergency prevails in the absence of any derogation from human rights and fundamental freedoms.[37] The actual existence of an emergency is a condition precedent to any derogation from human rights.

41. Accordingly, the first requirement is that a Government availing itself of its power of derogation must necessarily determine beforehand, at least implicitly, that a public emergency exists "which threatens the life of the nation".[38]

42. In this connection the following two elements should be stressed:

(*a*) The emergency must be nation-wide in its effects, so that, however severe the local impact of an emergency may be, it will not, in the absence of that condition, be a "public emergency" in the sense of article 4, paragraph 1, of the Covenant;

(*b*) The threat must be to organized life, which suggests that the emergency does not have to be one in which "the life of the nation" as such is threatened with extinction, but one in which there is such a breakdown of order or communications that organized life cannot, for the time being, be maintained.

43. The second formal requirement is that the state of public emergency must be "officially proclaimed",[39] which means that a public emergency can be declared only under conditions provided by national law.

44. This requirement is essential to prevent States from derogating arbitrarily from their obligations where such action is not justified by events.[40]

45. In most countries a public emergency could be declared only under conditions defined by law, and that guarantee would be lost unless a requirement of public proclamation was maintained.

46. The requirement of proclamation of public emergency cannot be replaced by the information which States parties to international conventions on human rights must forward on the measures of derogation from human rights and the reasons therefor.[41]

47. The third requirement is that the measures taken by the Government must be to the extent strictly required by the exigencies of the situation.

48. The measures in question are, *ex hypothesi*, measures restricting or stopping the exercise or enjoyment of certain human rights or freedoms guaranteed by law.[42]

49. Thus, when the organs and bodies established by international instruments for the implementation of human rights examine cases relating to public emergencies, and in particular to measures taken by Governments derogating from their obligations, they should consider whether a particular restriction or derogation is necessary or strictly required, and should

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[36] In the Lawless case, the approach of G. Maridakis is questionable in that he determines at the outset that the emergency measures involved are in conformity with article 15 of the European Convention on Human Rights and then concludes that there is no need to examine whether the rights affected had been derogated from in the first place; contrast this with the approach of the other members of the Court and of the members of the Commission. See "*Lawless*" *Case (Merits), Judgment of 1st July 1961 (Publications of the European Court of Human Rights. Series A: Judgments and Decisions, 1960–61)*.

[37] Notices of withdrawal of derogation submitted to the Secretary General of the Council of Europe in pursuance of article 15, paragraph 3, of the European Convention on Human Rights state that "the provisions of the Convention are again being fully executed" in the relevant territory as soon as no more human rights are suspended, and not as soon as an official proclamation terminating the state of emergency is issued: see, for example, the notes verbales of the United Kingdom Permanent Representative to the Council of Europe relating to Nyasaland (*Yearbook of the European Convention on Human Rights, 1961*, p. 42) and Northern Rhodesia (*ibid., 1962*, pp. 8–10).

[38] In the Lawless case, to which reference is made in note 36 above, the European Court said: ". . . in the general context of Article 15 of the Convention, the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear; . . . they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed; . . ." (*Yearbook of the European Convention on Human Rights, 1961*, pp. 472–474). See also, in para. 30 above, the comments of the Council of Europe, para. (4); and para. 82 and note 58 below.

[39] See *Official Records of the General Assembly, Tenth Session*, Annexes, agenda item 28 (part II), document A/2929, chap. V, para. 38. In connection with the requirement of proclamation of the existence of public emergency, the following *inter alia*, were submitted by the Government of Ireland in its application against the United Kingdom Government before the European Commission on Human Rights. Although no official proclamation is provided for by Article 15 of the European Convention, the Government of Ireland drew the attention of the Commission upon the fact "that the Special Powers Act and Regulations had remained in force in Northern Ireland for 50 years and that it did not require any legislative act, even a proclamation or order-in-council, to make these powers effective". The applicant Government alleged that "even if it were announced that there were now or at any given time between 2,000 and 3,000 terrorists in Northern Ireland, the whole population of 1½ million people lived permanently under the shadow of the possibility of being interned immediately and without prior notice", and it contended that this lack of previous official proclamation involved a breach of article 1 of the Convention. Apart from rejecting the allegation that article 1 could constitute by itself an independent source of obligations, the respondent Government had stated that: "The reason for these powers always being in force was simply that, if a public announcement was required before the powers of internment and detention could be exercised, the period of time which would inevitably elapse between such a public announcement and the attempt to detain individual persons, would enable those persons to escape over the border." See *Yearbook of the European Convention on Human Rights, 1972*, pp. 208, 198.

[40] See "Report of the *Ad Hoc* Working Group established under resolution 8 (XXXI) of the Commission on Human Rights to inquire into the present situation of human rights in Chile" (E/CN.4/1188 of 4 February 1976), paras. 59–60.

[41] However, an assimilation of this kind is not excluded by the Committee of Experts on Human Rights of the Council of Europe. See Directorate of Human Rights, document DH/exp.(68) 16, "Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights—Differences in the definition of the rights guaranteed: comparison between articles 4 and 5 of the International Covenant on Civil and Political Rights and articles 15, 17 and 60 of the European Convention on Human Rights".

[42] The European Commission on Human Rights considered in the first Cyprus case that it was "competent to pronounce on the existence of a public danger which, under Article 15 [of the European Convention], would grant to the Contracting Party concerned the right to derogate from the obligations laid down in the Convention", and that, while "the Government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation", the Commission was also competent to decide whether the measures had been taken to the extent strictly required by the exigencies of the situation. See *Yearbook of the*

not accept the judgement of the respondent Government as conclusive.

50. The fourth requirement is that provided by article 4, paragraph 1, of the Covenant that the measures of derogation must not be inconsistent with the State party's other obligations under international law.

51. The obligations mentioned in the preceding paragraph must not conflict with the other obligations of the State party under treaty or under customary law. Article 4 in this respect introduces a purely legal restriction on the right to derogate which is in contrast to the other factual criteria laid down in this article.[43]

52. Again, the organs and bodies competent for the implementation of human rights instruments should consider *ex officio* whether the requirement imposed by the above-mentioned provision has been satisfied.

53. It must not be possible for a State to avail itself of article 4 of the Covenant to release itself from its obligations under other human rights instruments.[44]

54. The fifth requirement is that the measures taken for derogation from human rights do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[45]

55. The sixth requirement, provided by article 4, paragraph 3, of the Covenant, is that any State party to the Covenant availing itself of the right of derogation must immediately inform the other States parties to the Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. Also, a further communication must be made, through the same intermediary, on the date on which it terminates such derogation.

56. In this connection, notification under article 4, paragraph 3, may have a limited retroactive effect. No specific time-limit is laid down for notifications.

57. Nevertheless, the Special Rapporteur interprets the words "shall immediately inform" as implying that the notification should be transmitted through the Secretary-General to the other States parties within a reasonable time and in any case without delay.[46]

58. A further communication should be made through the intermediary of the Secretary-General of the United Nations on the date on which a State party to the Covenant terminates the derogation from certain human rights.

59. Another issue interrelated with article 4 of the Covenant is the principle of necessity common to all legal systems.

60. A great number of States have constitutional provisions empowering them to take measures in a public emergency which would not otherwise be lawful.

1. NATIONAL ORGANS COMPETENT TO DECLARE THE EXISTENCE OF A PUBLIC EMERGENCY

61. Article 4 of the Covenant does not provide which organ of the State is competent to declare a state of public emergency.

62. The wording of the requirement of official proclamation is vague enough to condone in advance a proclamation of public emergency issued by the legislative or the executive authority, a military officer or anyone else.

63. Nevertheless, it is consistent that the scope of the International Covenants and, in particular, the meaning of the provisions of article 4 of the International Covenant on Civil and Political Rights to exclude *a priori* from consideration the military as well as the judicial authorities.

64. No really democratic system can entrust to military or police officers the power to proclaim an emergency without violating the rule of law.

65. The judicial authority has never been granted the exclusive power to make an original declaration of public emergency because it is unlikely to be aware in good time of the urgency of the situation and of the facts constituting a public emergency.

66. It must be assumed that a declaration of public emergency is a matter for the political organs of the State, which are in a position to make the appropriate assessment of facts fully known to them alone in the light of their general policy and of the overall state of national security or the dimensions of an extraordinary peril.

67. At the outset it should be for the legislative authority[47] to decide whether a particular situation amounts to such a state of emergency as to warrant the adoption of special legal measures. This necessarily implies two main consequences:

(*a*) The constitution or *ad hoc* legislation must have authorized the legislative authority to declare a public emergency by the adoption of a simple resolution; otherwise the necessity to pass through the burdensome procedure of ordinary legislation would have the effect of requiring most of the time a provisional proclamation by the executive authority and would defeat the very purpose of the general rule that is supposed to be followed;

(*b*) The merits of each particular situation likely to be proclaimed as a public emergency need to be given

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European Convention on Human Rights, 1958–1959, Application No. 176/56, p. 176.

In the Lawless case, the European Court of Human Rights assumed the same principle: "it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case". *Ibid., 1961*, p. 472.

The Court accordingly considered, first, whether there could be said to be a public emergency threatening the life of the nation; second, whether the measures taken in derogation from obligations under the European Convention were "strictly required by the exigencies of the situation"; and, third, whether the measures were "inconsistent with . . . other obligations under international law".

[43] In this connection see J. E. S. Fawcett, *The Application of the European Convention on Human Rights* (Oxford, Clarendon Press, 1969), p. 250.

[44] With respect to the same provision in article 15 of the European Convention, see F. G. Jacobs, *The European Convention on Human Rights* (Oxford, Clarendon Press, 1975) pp. 207–208.

[45] With respect to discriminatory limitations on or derogations from human rights, see part two, chap. IV, above.

[46] The European Court of Human Rights, in the Lawless case, considered that communication without delay was an element in the sufficiency of information required by article 15, paragraph 3, of the European Convention. *Yearbook of the European Convention on Human Rights, 1961*, pp. 482–486.

[47] See J. L. Kapur, "Emergency powers of the President under the Indian Constitution", *Jahrbuch des Öffentlichen Rechts der Gegenwart* (Tübingen, Mohr, 1976), New Series, vol. 25, p. 421.

deliberate consideration by the legislative authority itself; no determination should be made in advance and *in abstracto* that such or such type of event will automatically or through an earlier prescribed procedure constitute a public emergency under law.

68. Respect for such standards is the best guarantee that no advantage will be taken of a stressful political situation to curtail abusively fundamental rights and freedoms,[48] provided that the legislative authority functions as a free democratic institution in the State in question.

69. Two categories of exceptions to this general rule may be contemplated:

(*a*) Some exceptions may result *ex necessitate*, "by the nature of things". In these cases no proclamation of public emergency is made at all: the threat is so sudden that it is met without recourse to express legal powers. The measures taken may be ratified *a posteriori* by the legislative authority or condoned by judicial application of the concept of *force majeure*.

(*b*) Exceptions are said to be permissible wherever it is impossible or inexpedient to summon Parliament for the purpose of proclaiming the emergency.

70. In contrast to the first case mentioned above, in the second case the threat is not so sudden as to prevent the executive authority from declaring the existence of a public emergency, but it is sufficiently imminent to justify not waiting until parliament is summoned and in a position to declare the public emergency.

71. The executive authority need only be empowered to declare a public emergency during the period in which it is impossible or inexpedient to wait for the legislature to proclaim it itself.

72. Accordingly, it could be concluded that it is the legislative authority itself which always has the competence to make a definitive proclamation of a public emergency. The executive authority can only make a provisional declaration until the legislative authority resumes its functions,[49] that is to say, "as soon as possible" (as recommended, *inter alia*, by the Lagos Conference on the Rule of Law, 1961) or immediately,[50] or within a specified time.[51]

73. Extension of the period of public emergency should be effected by the legislative authority only after careful and deliberate consideration of the necessity therefor.[52]

74. During any period of public emergency the executive authority should only take such measures as are reasonably justifiable for the purpose of dealing with the situation which exists during that period.[53]

75. Thus, the legislature should meet as soon as possible after the proclamation of a public emergency by the executive, in order to ratify or approve it.

76. By implication, however, the legislative authority should equally have the power to revoke a proclamation of a public emergency,[54] as well as the power to amend the period of its validity, by simple resolution.

77. With a possible exception in time of war, the proclamation itself should define this period of validity,[55] which should not exceed six months, subject to extension by the legislative authority.

78. It should be made clear that it is not the declaration made by the executive authority that may remain effective up to six months, but the proclamation made by the legislative authority or the one issued by the executive as ratified or amended by the legislative authority.

79. Then, upon the lapse of the period of validity initially set, or subsequently amended by the legislature, the proclamation becomes ineffective automatically.[56]

80. Extension of its duration must always be made for another fixed period and only by the legislative authority.

81. The legislative authority should remain in session throughout the crisis in order to exert a continuing control over the existence of the public emergency.

2. SUPERVISORY OR JUDICIAL REVIEW OF THE DECLARATION OF A PUBLIC EMERGENCY

82. The wording of article 4, paragraph 1, of the Covenant, which permits the taking of measures derogating from certain human rights "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed", also establishes basic criteria, which should be subject to supervisory or judicial review[57] by the Human Rights Committee competent under the Covenant, by other

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[48] See in particular paragraph 6 of the Conclusions of Committee I of the *African Conference on the Rule of Law, Lagos, Nigeria, January 3–7, 1961* (Geneva, International Commission of Jurists, 1961). See also the remarks made by Mr. A. Wade (Senegal), Rapporteur of Committee I, at the closing plenary meeting of the Conference, on 7 January 1961 (*ibid*., pp. 161–163). The resolution of the Conference, "The Law of Lagos", also appears in I. Brownlie, ed., *Basic Documents on Human Rights* (Oxford, Clarendon Press, 1971), pp. 440–441.

[49] See the views expressed by a number of participants in the *Seminar on the Effective Realization of Civil and Political Rights at the National Level*, Kingston, Jamaica, 25 April–8 May 1967 (ST/TAO/HR/29). Other participants, however, "felt that the legislature should be automatically convened by the declaration of a state of emergency by the executive" (*ibid*., para. 173).

[50] See Organization of American States document OAS/Ser.L/V/II.8 No. 6, as quoted by Martins, *loc. cit*., p. 140.

[51] In this connection, Ganshof van der Meersch said, *inter alia*: "The state of emergency, in principle, should be declared by parliament and, if parliament should not be able to do so, it should approve the state of emergency within a certain time limit". See Council of Europe, Consultative Assembly, *Parliamentary Conference on Human Rights, Vienna, 18–20 October 1971* (Strasbourg, 1972), chap. III, sect. B, Summary of the first working sitting, p. 34.

[52] See paragraph 5 (iii) of the Conclusions of Committee II of the Lagos Conference on the Rule of Law, in Brownlie, *op. cit*., pp. 444–445.

[53] *Ibid*.

[54] See *Seminar on the Effective Realization* . . . (ST/TAO/HR/29), para. 173.

[55] "The duration of the state of siege must be expressly limited" (*1959 Seminar on Judicial and Other Remedies against the Illegal Exercise or Abuse of Administrative Authority*, Buenos Aires, 31 August to 11 September 1959 (ST/TAO/HR/6), para. 37).

[56] See *Seminar on the Effective Realization* . . . (ST/TAO/HR/29), para. 182.

[57] See also European Convention on Human Rights, art. 15, para. 1; European Social Charter, art. 30, para. 1; American Convention on Human Rights, art. 27, para. 1.

organs established by relevant international instruments or by national courts.[58]

83. The onus of proof as to the existence of a public emergency and the necessity of the measure should rest on the respondent Government.

84. But the rules of evidence are less strict in international law and the differences between the parties are often based not so much on the particular facts of the case as on their proper estimation and appreciation.[59]

85. Criteria which cannot be measured, such as the margin of appreciation,[60] the onus and standard of proof and the elements of good faith and reasonableness merely constitute useful tools at the disposal of those exercising functions of a judicial nature.

86. The examination of declarations of public emergency should be made by the Human Rights Committee, which is competent under the Covenant, even though the system of implementation enables the Human Rights Committee solely to seek and receive

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[58] See the Covenant, arts. 28–45; see also part one and part two, chap. I, above.

This is an aspect based, in particular, on the case law of the European Convention on Human Rights and the reports and other documents of the European Commission on Human Rights. Thus, when the European Commission undertook to examine the first state application lodged by the Greek Government against the Government of the United Kingdom on the basis of article 15, paragraph 1, of the European Convention in 1956, it was submitted, *inter alia*, that no public emergency existed in Cyprus that justified the derogations notified by the Government of the United Kingdom in its notes verbales of 7 October 1955 and 13 April 1956 to the Secretary General of the Council of Europe. See these notes verbales in *European Commission on Human Rights: Documents and Decisions, 1955–1956–1957* (The Hague, Martinus Nijhoff, 1959), pp. 49–50. In its reply, the respondent Government informed the Secretary General of the Council of Europe, in purported fulfilment of its obligation under article 15, paragraph 3, of the European Convention, that a public emergency within the meaning of article 15 of the Convention existed in Cyprus. It had, thus, determined unilaterally that the commission of various acts and the facts amounted to a public emergency under the relevant provision of the European Convention. However, this aspect was not regarded by the Commission as having been conclusively determined.

The application was referred to a seven-member Sub-Commission charged with establishing the facts and seeking a friendly settlement of the matter in accordance with articles 28 and 29 of the European Convention. The Sub-Commission decided to carry out an investigation in Cyprus in order to "enable the Commission to judge as to the existence and extent" of a public danger for the purposes of article 15 of the European Convention. *Ibid.*, p. 130.

In this case as well as in other cases the European Commission took the view, with which the European Court agreed in the Lawless case, that it is empowered to make political judgements, otherwise "the international protection of human rights" would lose "its effectiveness" and "its very meaning".

Specifically, as a result of the direct investigation carried out in Cyprus by the above-mentioned Sub-Commission in 1959, the European Commission, in plenary, drew up a report in which it considered itself authorized by the Convention to express a critical opinion on derogations under article 15 and "competent to decide whether measures taken by a Party under Article 15 had been taken to the extent strictly required by the exigencies of the situation". At the same time, it conceded that the Government concerned retained, within certain limits, its discretion in appreciating the threat to the life of the nation and that "the Government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation". See *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 176; see also *European Court of Human Rights, "Lawless" Case, Series B: Pleadings, Oral Arguments and Documents, 1960–1961*, p. 82.

The European Court of Human Rights in the Lawless case held, *inter alia*, that "it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled". See *"Lawless" Case (Merits), Judgment of 1st July 1961 (Publications of the European Court of Human Rights, Series A: Judgments and Decisions, 1960–61)*, p. 55. The European Court never mentioned that a margin of appreciation or a measure of discretion should be left to the States parties and it did not answer the request of the Irish Government to declare that the "Commission has erred in principle in its approach to the application of article 15 of the Convention". In particular, no express mention of a margin of discretion is made by G. Maridakis in his individual opinion. *Ibid.*, pp. 64–67.

Further, the European Court found that "from a combination of several factors" the respondent Government had "reasonably deduced" and "were justified in declaring" the existence of a public emergency threatening the life of the nation (*ibid.*, pp. 56–57). The European Court on the particular issue of the existence of an emergency in Ireland applied very liberally the natural and customary meaning of the terms provided for by Article 15, paragraph 1, to the facts of the case, thereby implicitly upholding the views of the Irish Government as to the proper forum where decisions of this nature should be made. It is to be noted that in his individual opinion G. Maridakis took it for granted that an emergency existed without analysing the facts at all. *Ibid.*, p. 64.

It is the special subject-matter of article 15 which compels the recognition of some discretion. The majority of the European Commission in the Lawless case held that "in making a determination" that an emergency existed in Ireland during the relevant period, the respondent Government "did not go beyond the proper margin of discretion allowed to it" under article 15, paragraph 1, and it assumed that the requirements of this provision would be met if the factual elements available could disclose that a situation prevailed which the Government might qualify as a public emergency without going beyond the proper limits of its margin of appreciation. Most members of the minority, among them Mr. Eustathiades and Mr. Süsterhenn, advocated that public emergencies under the European Convention be confined to situations which are analogous or tantamount to an "international war" in the ordinary sense of the term. *"Lawless" Case, Series B, 1960–61*, pp. 81, 90–98, 203.

In connection with the notion of "emergency", see also the interesting article of S. Marks, "La notion de période d'exception en matière des droits de l'homme", *Human Rights Journal* (Paris), vol. VIII, No. 4, 1975, pp. 821–858.

[59] On this issue, the European Commission held in the first Greek case that "the burden lies upon the respondent Government to show that the conditions justifying measures of derogation under Article 15 have been and continue to be met, due regard being had to the 'margin of appreciation' which, according to the constant jurisprudence of the Commission, the Government has in judging the situation in Greece as from the moment it assumed power on 21st April 1967" (*Yearbook of the European Convention on Human Rights, 1969*, p. 72). In spite of this and of its decision in the Lawless case, the European Commission in this case strictly limited its analysis to the "evidence before it" and concluded that "the respondent Government has not satisfied the Commission by the evidence it has adduced that there was on 21st April 1967 a public emergency threatening the life of the Greek nation" (*ibid.*, p. 76). Some members of the European Commission, applying the doctrine of discretion, in spite of the onus of proof resting on the respondent Government, let the doubt benefit that Government, as had been done in the Lawless case.

[60] The notion "margin of appreciation" is to be found expressed in only one provision of the European Convention—article 1, second paragraph, of the first Protocol, which reads: "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties". The term sometimes used by the organs of implementation of the European Convention, "margin of appreciation", is probably a translation from the French and the concept of a "power of appreciation" is derived from those continental systems of administrative law which established and recognized the role and competence of the highest French administrative court, the Conseil d'Etat. See F. G. Jacobs, *op. cit.*, p. 201. In connection with the imposition of restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals

information, to effect conciliation and to make recommendations.[61]

87. The derogation clause of the Covenant was adopted with a view, among others, to preventing States parties from being left free to decide for themselves when and how they would exercise emergency powers.[62]

88. The same could be said for the American Convention on Human Rights,[63] article 27 of which provides the following:

> *Article 27. Suspension of Guarantees*
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> 1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
>
> 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
>
> 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

89. The minimum standards established under article 4 of the Covenant should also find application in national law.

90. The conflicting values that international organs and national courts face when confronted with political judgements are of exactly the same nature, and a proclamation of emergency always remains a matter of most serious concern as it directly affects and may infringe upon human rights.

91. This means that the ordinary courts of a State should not abdicate their responsibility of testing the legality of a declaration of emergency, even if it may be considered necessary or advisable to leave the political organs of the State with a certain—preferably implied—margin of appreciation.

92. Nevertheless, the value of the safeguard ensuing from the possibility of judicial review is attenuated not only by the necessity of leaving some discretion to the State but also by the fact that such control is not automatic and needs first to be requested by an aggrieved party.

93. The safeguard of judicial control over declarations of public emergency is far from being generally accepted.

94. Committee I of the Lagos Conference on the Rule of Law affirmed that the courts should have jurisdiction with respect to delegated legislative powers and to the exercise of emergency powers.[64]

95. The following views were expressed by some participants in the Seminar on *Amparo, Habeas Corpus* and Other Similar Remedies on this point:

> In other [countries] again, the courts must rule whether the measures taken by the executive authority were justified by the state of emergency.
>
> . . .
>
> The majority of the participants agreed that it would be advisable that the courts should be empowered to decide on the legality of the measures adopted by the authority during the state of emergency.[65]

96. A declaration of emergency is primarily a decision of a political nature. In particular, article 4, paragraph 3, of the Covenant requires that a State availing itself of the right of derogation reveal the provisions from which it has derogated and the reasons by which it was actuated.[66]

97. This means that the Government has to mention in its notification what are the actual circumstances which strictly require the taking of such measures and, hence, what constitutes the "public emergency threatening the life of the nation" which has been officially declared.[67]

98. The political and judicial control and means of enforcement should be established in order to ensure that the power to proclaim a public emergency does not become unlimited.

99. International conventions, national constitutions and other standard-setting sources of law indicate the actual situations which constitute a legal state of public emergency capable of provoking the institution of extraordinary rules of law affecting human rights.[68]

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and the protection of the rights and freedoms of others, see article 8, paragraph 2, of the European Convention. In this respect, F. G. Jacobs observes that the idea underlying the notion of a "power of appreciation" is that the European Convention leaves the authorities a certain area of discretion. Interference with the rights guaranteed by the Convention does not have to be shown to be actually necessary in order to be justified under, for example, article 8, paragaph 2, of the Convention; it has to be shown only that the authorities had sufficient reason to believe that it was necessary. *Ibid.*

The notion "margin of appreciation" is a very vague notion and in using it the European Commission—for example, in the above-mentioned first Greek case—comes nearest perhaps to the interpretation of what is necessary.

[61] Covenant, art. 40. See also, for example, the report of the Human Rights Committee, 1977 (*Official Records of the General Assembly, Thirty-second Session, Supplement No. 44* (A/32/44), para. 118).

[62] See paras. 10 and 11 above.

[63] See above, Introduction, paras. 123–129; and part two, paras. 707–719.

[64] Paragraph 3 of the Conclusions of Committee I reads: "The Judiciary should be given the jurisdiction to determine in every case upon application whether the circumstances have arisen or the conditions have been fulfilled under which such power is to be or has been exercised", and paragraph 7 of the Conclusions of the same Committee reads: "The Conference feels that in all cases of the exercise of emergency powers, any person who is aggrieved by the violation of his rights should have access to the courts for determination whether the power has been lawfully exercised". See Brownlie, *op. cit.*, p. 442.

[65] *Seminar on Amparo, Habeas Corpus and Other Similar Remedies*, Mexico, D. F., 15–28 August 1961 (ST/TAO/HR/12), paras. 97 and 99.

[66] The Inter-American Commission on Human Rights has already asked States members of the Organization of American States to send annual information on any suspension of human rights and on the reasons therefore (OAS document 35(1967)).

[67] See *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (part II), document A/2929, chap. V, paras. 35–47.

[68] See *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* (United Nations publication, Sales No. 65. XIV. 2), paras 754–756.

100. These international and national instruments use the terms "war"[69] or "public emergency".[70]

101. "Public emergency", which is often equated with "public danger", does not refer merely to one type of situation. It is often specified that the emergency in question is one that threatens "the life of the nation" or "the independence or security" of a State,[71] or one that covers the case of the "democratic institutions" of the country being threatened by subversion, the case of "sudden military challenge" to the survival of the nation, and so on. A calamity or public disaster threatening the life or "well-being"[72] of the community falls within a special category of emergencies provoked by nature.

102. An "emergency" is incompatible with a perpetual state of affairs and is necessarily limited in time.

3. EXCEPTIONS FROM THE SCOPE OF APPLICABILITY OF DEROGATION PROVISIONS

103. Article 4, paragraph 2, provides expressly that no derogation is permitted even in time of public emergency from the provisions of articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 of the International Covenant on Civil and Political Rights.[73]

(a) *The right to life (article 6)*

104. The right to life, which is protected by many international instruments,[74] is further expressly excluded from derogation under article 4 of the Covenant.

105. The right to life must be taken as referring to the actual human being.

106. In connection with the important issue of the moment from which life is safeguarded, article 4, paragraph 1, of the American Convention on Human Rights provides that the right to life "shall be protected by law, and, in general, from the moment of conception". The Covenant and the European Convention left this question open.

107. Article 6, paragraph 1, includes the statement: "No one shall be arbitrarily deprived of his life". This formulation obviously covers, *inter alia*, death resulting from action lawfully taken to suppress insurrection, rebellion or riots and killing in defence of persons, property or the State or in circumstances of grave civil commotion.

108. The same article, in its paragraph 3, provides: "When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide."

109. The provisions of article 6, paragraph 2, provide for the conditions under which a death penalty may be imposed. Thus, a death penalty "may be imposed only for the most serious crimes"; it must be "in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide". Finally, the death penalty "can only be carried out pursuant to a final judgement rendered by a competent court".

110. Accordingly, since these provisions cannot be suspended, and since the last paragraph of article 6 states that: "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment . . .", this means that abolition of capital punishment is desirable.

111. Further, under paragraphs 4 and 5 of article 6, anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases, and sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.

112. Article 4, paragraph 4, of the American Convention on Human Rights states: "In no case shall capital punishment be inflicted for political offenses or related common crimes".

(b) *Freedom from torture or cruel, inhuman or degrading treatment or punishment (article 7)*

113. Article 7 of the Covenant expressly provides that no one shall be subjected to torture[75] or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free

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[69] See, for example, European Convention on Human Rights, art. 15, para. 1; and European Social Charter, art. 30, para. 1.

[70] See paras. 8–15 above.

[71] American Convention on Human Rights, art. 27, para. 1.

[72] Covenant, art. 8, para. 3 (*c*) (iii). On the question of emergency arising from economic and social conditions as a whole, see Marks, *loc. cit.*

[73] The following paragraphs of chapter VI of the "Annotations on the text of the draft International Covenants on Human Rights" (*Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (part II), document A/2929) were referred to in the preparation of the present section: paras. 1–25, 45–49, 93–98 and 105–118.

[74] See, for example, Universal Declaration of Human Rights, art. 3; Covenant, art. 6; European Convention on Human Rights, art. 2; American Declaration of Human Rights, art. 1; and American Convention on Human Rights, art. 4.

[75] The following is the definition of the term "torture" given in article 1 of the draft convention on torture and other cruel, inhuman or degrading treatment or punishment, as adopted in 1979 by a working group of the Commission on Human Rights:

> "1. For the purpose of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> "2. Torture is an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.
>
> "3. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application relating to the subject matter of this Convention."

See *Official Records of the Economic and Social Council, 1980, Supplement No. 3* (E/1980/13–E/CN.4/1408 and Corr.1), p. 68.

consent to medical or scientific experimentation.

114. The word "torture" in this article means both mental and physical torture.

115. The European Commission on Human Rights wrote, in connection with the first Greek case, that the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.[76]

116. The provisions of article 7 of the Covenant prohibit not only "inhuman" but also "degrading" treatment or punishment.

117. The second sentence of article 7 reads: "In particular, no one shall be subjected without his free consent to medical or scientific experimentation". This provision was intended to prevent the recurrence of atrocities such as those committed in concentration camps during the Second World War.

118. Experiments involving risk should not, in principle, be carried out without the free consent of the person concerned. In the preparatory work on article 7, however, it was said that there might be some exceptions to this principle where the interests of the health of the individual or the community are involved.[77]

119. There was general agreement that in cases of failure to obtain the free consent of a sick, sometimes unconscious person, dangerous experimentation should not be illegal where such was required by his state of physical or mental health.

120. Further, arbitrary imprisonment, detention, and even deportation and extradition constitute a form of subjectively inhuman and degrading treatment.

121. It could also be said that violation of article 10, paragraph 2 (*b*), of the Covenant, which states that: "Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication", may constitute inhuman treatment of accused minors, although this provision is subject to suspension.

(c) *Freedom from slavery, servitude and forced labour (article 8)*

122. The basic objective of the Slavery Convention of 1926 was to prevent and suppress the slave trade, to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms and to eliminate all laws and customs which refer to "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".[78]

123. The slave trade includes "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves".[79]

124. Article 4 of the Universal Declaration provides that "No one shall be held in slavery or servitude . . .", while article 8, paragraph 1, of the Covenant refers only to slavery. This is because when the Covenant was being drafted the point was made and accepted that "slavery" and "servitude" are two different concepts and should be dealt with in two separate paragraphs. During the preparatory work on draft article 8 it was pointed out that slavery, which implied the destruction of the juridical personality, was a relatively limited and technical notion, whereas servitude was a more general idea covering all possible forms of man's domination of man. While slavery was the best known and the worst form of bondage, other forms existed in modern society which tended to reduce the dignity of man.[80]

125. Accordingly, the prohibition of servitude is included in article 8, paragraph 2.

126. Further, article 8, paragraph 3 (*a*), provides that: "No one shall be required to perform forced or compulsory labour".[81]

127. In discussing the above-mentioned issue during the preparatory work on article 8 of the Covenant, reference was made to article 2 of the ILO Forced Labour Convention, 1930 (No. 29). Paragraph 1 of that article defined the term "forced or compulsory labour"[82] as meaning "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". Paragraph 2 listed a number of exceptions. This definition, especially when read in the

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[76] *Yearbook of the European Convention on Human Rights, 1969, The Greek Case*. Amnesty International has expressed serious objections and reservations to the inclusion of "the new element of 'justifiability'. . . . 'justifiability' is a value judgement, and to introduce a value judgement into the definition is to render it scarcely operative. As a policy it would leave the door open to abuse, for the prohibition on torture could be circumvented by judging the most heinous acts to be 'justifiable', and thus not torture". See Amnesty International, *Report on Torture*, 2nd ed. (London, Duckworth, 1975), pp. 35–36.

[77] However, the extent of such exceptions gave rise to some discussion. See *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28 (part II), document A/2929, chap. VI, para. 15.

[78] Slavery Convention, art. 1 (1).

[79] Slavery Convention, art. 1 (2).

[80] See, also, the reports of the Working Group on Slavery on its fifth and sixth sessions (E/CN.4/Sub.2/434 and E/CN.4/Sub.2/447).

[81] See the comments of ILO in part one, para. 65; part two, para. 97; and para. 29 above.

[82] It will be recalled that in accordance with Economic and Social Council resolution 350 (XII) of 19 March 1951, an *Ad Hoc* Committee on Forced Labour was established "to study the nature and extent of the problem raised by the existence in the world of systems of forced or 'corrective' labour". The *Ad Hoc* Committee submitted its report (E/2431) to the Economic and Social Council and the ILO in 1953. In resolution 524 (XVII) of 27 April 1954, the Council, *inter alia*, condemned "systems of forced labour which are employed as a means of political coercion or punishment for holding or expressing political views, and which are on such a scale as to constitute an important element in the economy of a given country" and appealed to "all Governments to re-examine their laws and administrative practices in the light of present conditions and the increasing desire of the peoples of the world to reaffirm faith in fundamental human rights and in the dignity and worth of the human person". The General Assembly, in resolution 842 (IX) of 17 December 1954, endorsed the condemnation by the Council of the existence of systems of forced labour and expressed its support of the Council's appeal to Governments.

light of the exceptions, was not considered entirely satisfactory for inclusion in the Covenant. In a first draft, it was provided that "no one shall be required to perform forced or compulsory labour except pursuant to a sentence to such punishment for a crime by a competent court". The proviso "except pursuant to a sentence to such punishment for a crime by a competent court" was deleted, for it implied that forced or compulsory labour could be imposed upon a person pursuant to a court sentence. It was feared that such a clause might provide a loophole and would render the guarantee ineffective. However, it was recognized that imprisonment with "hard labour" existed as a form of penalty under the penal systems of some countries. It was therefore thought necessary to include a suitable provision which would take such systems into account.

128. Thus, in article 8, paragraph 3 (*b*), of the Covenant, it is provided that the prohibition of forced or compulsory labour "shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court". The words "in pursuance of a sentence to such punishment by a competent court" were intended to indicate that the performance of hard labour could be required only if explicitly stated in the sentence of the court. In an earlier draft, the words "hard labour" were between quotation marks, but it was subsequently decided to delete the quotation marks, for the expression "hard labour" when used between quotation marks might imply some special punishment. During the preparatory work, objection was raised to the use of the term "punishment". It was maintained that the concept of "punishment" was outmoded and was no longer recognized in modern criminology. It was also suggested that the clause should indicate that persons found guilty of "political" crimes should not be sentenced to "hard labour". The suggestion was opposed, however, on the ground that there was no exact definition of the term "political crime" and its interpretation varied from one country to another.

129. Article 8, paragraph 3 (*c*) enumerates, in four subparagraphs, the kinds of work or service not deemed included within the term "forced or compulsory labour". Subparagraph (i) was intended to cover ordinary prison work which persons under detention pursuant to a court order might be required to do. This would include routine work performed in the course of detention and work done to promote the delinquent's rehabilitaton. The clause specifically excluded performance of "hard labour" as the term was used in subparagraph (*b*). The phrase "normally required of a person who is under detention" was intended to bring out the fact that the clause was intended to refer to work ordinarily done by prisoners and not to hard labour. The inclusion of the word "normally" provides a safeguard against arbitrary decisions by prison authorities with regard to the work which might be required of persons under detention. On the other hand, it was pointed out during the drafting of this paragraph that the insertion of the word "normally" was useless and restrictive. In some special circumstances prison authorities might find it necessary to give persons under detention work that was different from their customary labour. Some questions were also raised regarding the meaning of the term "detention". It was explained that the term covered all forms of compulsory residence in institutions in consequence of a court order.

130. The clause relating to conscientious objectors in sub-paragraph (ii) was intended to indicate that any national service required by them by law would not fall within the scope of forced or compulsory labour. As the concept of conscientious objection was not recognized in many countries, the phrase "in countries where conscientious objection is recognized" was inserted. Proposals to the effect that services of conscientious objectors "be carried out in conditions equal to those accorded to all other citizens subjected thereto" and that such services "be compensated with maintenance and pay not inferior to what a soldier of the lowest rank receives" were rejected. Those who supported the proposals pointed out that in certain countries where conscientious objectors were released from military obligations, they were subjected to treatment inconsistent with human dignity; hence it was essential to provide some minimum safeguards. On the other hand, those who opposed the proposals argued that it was inappropriate to go into details concerning the treatment of conscientious objectors.

131. Subparagraph (iii) did not give rise to debate at the drafting stage. It provides that any service exacted in cases of emergency threatening the life or well-being of the community shall not come within the term "forced or compulsory labour".

132. There was considerable discussion as to whether "minor communal services" should not also be included in the provisions of subparagraph (iv). It was pointed out that the Forced Labour Convention, 1930, included provisions concerning "normal civic obligations" and "minor communal services". The provision concerning "minor communal services" was meant to apply to Non-Self-Governing Territories, while that relating to "normal civic obligations" applied to sovereign States. It was contended, however, that the distinction was unacceptable and should not be perpetuated in the Covenant.

133. Furthermore, it was pointed out that the ILO itself, in a proposed text which it had communicated to the Commission,[83] had suggested that "minor communal services" should be abolished in the shortest time possible. The opinion was also expressed that it was not necessary to mention "minor communal services" since the term "normal civic obligations" was a much broader term and would include the former.

(d) *Imprisonment on the ground of inability to fulfil a contractual obligation (article 11)*

134. Article 11 of the Covenant provides that: "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation".

135. During the preparatory work on this article, it was agreed that the article did not cover crimes committed through the non-fulfilment of obligations of public interest, which were imposed by statute or court

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[83] E/CN.4/158 of 21 March 1949.

order, such as the payment of maintenance allowances. With regard to contractual obligations, various opinions were expressed. A proposal to restrict the scope of the article to "inability to pay a contractual debt" was not accepted. It was agreed that the article should cover any contractual obligations, namely, the payment of debts, performance of services or the delivery of goods. One opinion was, however, that contractual obligations undertaken by the individual towards the State were sometimes so vital in nature—such as the delivery of essential foodstuffs for the population—that inability to fulfil them should justify imprisonment.

136. It was pointed out that in practically all countries persons who were able but unwilling to fulfil contractual obligations might be punished by imprisonment. Reference was also made to statutes which provided for the arrest of persons with outstanding debts who were about to leave the country for an indefinite period. A proposal to add the words "unless he is guilty of fraud" at the end of the article was, however, rejected. The words "merely on the grounds of inability", it was agreed, made it sufficiently clear that all cases of fraud were excluded from the scope of the article.

(e) *Prohibition of retroactive application of criminal law (article 15)*[84]

137. Article 15 of the Covenant reads:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

138. Article 15, which prohibits the retroactive application of criminal law, applies both to the definition of offences and to the severity of their punishment.

139. During the preparatory work on this article it was said that the reference in paragraph 1 to international law was intended to secure that no one shall escape punishment for a criminal offence under international law by pleading that his act was legal under his own national law. The reference to international law constituted an additional guarantee of security to the individual, whom it protected from possible arbitrary action even by an international organization.

140. It was argued that the third sentence of paragraph 1 contradicted the assumption underlying the second sentence, namely that a penalty must be that which was authorized by the law in force at the time of its imposition. It was also said that, notwithstanding the praiseworthiness of the goal at which the third sentence aimed, it was not appropriate to make provision for it in the covenant, since it would seem to mean that convicted persons would be enabled as of right to demand that they should benefit from any change made in the law after their conviction. It was asserted that the executive authority of States parties to the Covenant should retain an absolute discretion in applying the benefits of subsequently enacted legislation to such persons. In opposition to these views it was observed that the tendency in modern criminal law was to allow a person to enjoy the benefit of such lighter penalties as might be imposed after the commission of the offence with which he was charged; the laws imposing new and lighter penalties were often the concrete expression of some change in the attitude of the community toward the offence in question.

141. It was argued that paragraph 2 of the article was superfluous; if, as was claimed, it was intended as a confirmation of the principles applied by the war crimes tribunals after the Second World War, it might have the opposite effect of calling into question the validity of the judgements of those tribunals; and if it was intended as a guarantee that no alleged war criminal in the future would be able to argue that there were no positive principles of international law or of relevant national law qualifying his acts as crimes, it merely reiterated what was already contained in the expression "international law" in paragraph 1, since that term included the generally recognized principles of law mentioned at the end of paragraph 2. On the other hand, the view was expressed that the saving provision set forth in paragraph 2 had no application to past convictions for war crimes, nor was it fully covered by the term "international law" contained in paragraph 1.[85]

142. It should also be noted that the right in question is not applicable to civil matters and that the notion "criminal offence" does not cover disciplinary offences.

143. Article 15 not only prohibits the retroactive application of criminal laws or penalties; it also confirms the fundamental principle "*nullum crimen, nulla poena sine lege*"[86] and prohibits in particular extension of the application of the criminal law by analogy.

144. Accordingly, an individual may not be convicted by application of law which cannot reasonably be applied to his case or which had already been abrogated, either expressly or by implication, at the time of his act or omission, any more than by application of law which did not yet exist at that time.

(f) *Recognition as a person before the law (article 16)*

145. The text of article 16 is based on article 6 of the Universal Declaration. That article applies to human beings, not to "juridical persons", and the expression "as a person before the law" is meant to ensure recognition of the legal status of every individual and of his capacity to exercise rights and enter into contractual obligations.

(g) *Freedom of thought, conscience and religion (article 18)*

146. Paragraph 1 of article 18 is based on article 18 of the Universal Declaration.

147. During the debate on this article, freedom of thought, conscience and religion was frequently characterized as "absolute", "sacred" and "inviolable".

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[84] See above, part two, paras. 376–384.

[85] See also the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

[86] See above, part two, paras. 376–384.

The first clause of the article therefore declared in clear and simple terms, without qualifications, "Everyone shall have the right to freedom of thought, conscience and religion". No restrictions of a legal character, it was generally agreed, could be imposed upon man's inner thought or moral consciousness, or his attitude towards the universe or its creator; only external manifestations of religion or belief might be subject to legitimate limitations.

148. The question was raised whether the words "thought" and "belief" in this article were intended to be different concepts. The question was also raised whether there was any clear-cut distinction between "the right to freedom of thought" in article 18 and "the right to hold opinions without interference" in article 19.

149. The limitations clauses of article 18[87] and those of articles 19, 20 and 21 were drafted, revised and adopted at different times and were consequently couched in varying terms as regards such expressions as "national security", "public order", "public health or morals", etc.

150. Article 18 makes a distinction between freedom of thought, religion or belief and their expression or manifestation. In this respect, to manifest means to show by overt act, to demonstrate an attitude to the eyes or minds of others. The freedoms set out appear to be absolute and not subject to any interference by public authority, which is confined in paragraph 3 to manifestations of religion or belief in worship.

151. The distinction is essential for, while it is true that the manifestation of religion or belief is vital to them and demands protection in society, the internal freedom for religious experience or the construction of belief is not less vital.[88]

152. The freedoms guaranteed are closely related to the right to opinions and to the freedom of expression provided for by article 19 of the Covenant.

153. Article 18 may appear to give a right to conscientious objection[89] to military service.[90] Such a right is in fact already recognized in many countries.

154. Accordingly a refusal to recognize it could not be justified under article 18, paragraph 3, which provides for limitations on specific grounds; as has been stated repeatedly in part two of the present study, such limitations should be considered necessary within the framework of a democratic society,

155. Nevertheless, in accordance with the basic principle that the Covenant must be read as a whole, article 18 must be interpreted in the light of article 8, paragraph 3 (*c*) (ii), which provides: "For the purpose of this paragraph the term 'forced or compulsory labour' shall not include: . . . (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors."

156. The following conclusions seem to follow from the wording of this provision:

(*a*) Since it speaks of conscientious objectors "in countries where conscientious objection is recognized", it seems that Member States are not obliged, under article 18, to recognize them; and

(*b*) Since article 8, paragraph 3 (*c*) (ii), makes express provision for substitute service, it follows that where conscientious objection is recognized, and performance of any national service in lieu of military service is permitted, conscientious objectors cannot claim under article 18, exemption from substitute service.

157. Accordingly, no one is entitled under article 18 to exemption on grounds of conscience either from military service or from substitute service.[91]

158. The question of conscientious objection to military service was briefly discussed by the United

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[87] See E/CN.4/NGO/10, 21, 26; E/CN.4/AC.3/SR.5; E/CN.4/AC.1/SR.26; E/CN.4/SR.116, 117, 119, 160, 319; E/CN.4/82/Add.2, 85, 170, 272, 301, 365, 515/Add.12, 515/Add. 13, 524, 528; E/L.68.

[88] In connection with the similar provisions of articles 9 and 10 of the European Convention, the Committee on Legal and Administrative Questions said: "It should be added that in recommending a collective guarantee not only of freedom to express convictions, but also of thought, conscience, religion and opinion, the Committee wished to protect all nationals of any Member State, not only from breaches of obligation for so-called reasons of State, but also from those abominable methods of police inquiry or judicial process which rob the suspected or accused person of his intellectual faculties and conscience." (Report (5.9.1949) para. 12, *Travaux préparatoires*, i.91.) See Fawcett, *op. cit.*, p. 200.

[89] "Liberty of conscience has been defined as 'the right to hold and profess what principles we choose, and to live in accordance with them', Plamenatz, *Man and Society*, vol. I, p. 49." Jacobs, *op. cit.*, p. 144.

[90] The complex question was examined by the European Commission of Human Rights in the "Grandrath" case (see *Yearbook of the European Convention on Human Rights, 1967*, pp. 630–694.

The applicant, a German citizen and a Bible study leader in the congregation of Jehovah's Witnesses, had been recognized by the Düsseldorf District Office as a conscientious objector. He was then required by the competent Minister to perform substitute civilian service, but was given an opportunity to apply for exemption or postponement. The Minister rejected his claim for exemption, and this rejection was upheld by the administrative courts. As a result of his continued refusal to perform substitute civilian service, proceedings were instituted against him under the Substitute Civilian Service Act; he was convicted and sentenced to eight months' imprisonment, reduced on appeal to six months. His appeal against conviction was rejected as was his constitutional appeal to the Federal Constitutional Court (Bundesverfassungsgericht). All domestic remedies were then exhausted, and he served his sentence from October 1964 to April 1965. The applicant alleged breaches of the European Convention on Human Rights in two respects: of article 9, in that he had not been exempted from substitute civilian service though his objections to its performance were based on his conscience and religion; and of article 14, in that he was, as a Bible study leader in the congregation of Jehovah's Witnesses, a minister in the sense of article 11 (3) of the Compulsory Military Service Act and that in being refused exemption he had been subject to discrimination as compared with Evangelical or Roman Catholic ministers.

The Commission distinguished under article 9 the issues of religion and of conscience. It found that the applicant had not claimed that the substitute civilian service would have interfered with the private and personal practice of his religion; and that it would not in fact have interfered with his duties, as a Bible study leader, to his religious community, since his situation would not, regard being had to article 18 of the Substitute Civilian Service Act, have been greatly different from that in which he normally lived.

On the issue of conscience the European Commission observed that, since in article 4 (3) (*b*) of the European Convention it is expressly recognized that civilian service may be imposed on conscientious objectors as a substitute for military service, it must be concluded that objections of conscience do not, under the European Convention, entitle a person to exemption from such service. See Fawcett, *op. cit.*, pp. 200–201.

[91] In this respect, see also article 12 in conjunction with article 6, para. 3 (*b*) of the American Convention on Human Rights.

Nations Commission on Human Rights during its thirty-sixth session.[92]

159. Finally, article 18, paragraph 4, of the Covenant provides for religious and moral education. It recognizes respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

C. Economic, social and cultural rights

160. It may also be useful to mention that no emergency provision can be found in the International Covenant on Economic, Social and Cultural Rights.

161. Article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, provides: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

162. Thus, this provision refers mainly to the obligations of the States parties to take steps with a view to achieving progressively the full realization of the rights recognized by the International Covenant on Economic, Social and Cultural Rights.

163. The rights enumerated in the International Covenant on Economic, Social and Cultural Rights are subject to legitimate limitations and no exceptions are provided for in cases of public emergency.[93]

164. Nevertheless, article 4 of the International Covenant on Economic, Social and Cultural Rights provides that, in the enjoyment of those rights provided by the State in conformity with the Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.[94]

D. A brief comparative review of article 4 of the International Covenant on Civil and Political Rights, article 15 of the European Convention on Human Rights and article 27 of the American Convention on Human Rights

165. Article 4 of the International Covenant on Civil and Political Rights corresponds to article 15 of the European Convention on Human Rights, the provisions of which have already been implemented in certain cases considered by the European Commission and Court of Human Rights during the past 20 years.

166. The conditions for the applications of emergency measures prescribed in the Covenant are stricter than those in the European Convention. The latter does not prohibit, as do the Covenant and the American Convention, emergency measures which involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

167. The European Convention and the American Convention refer to "war" or other public emergency, and consequently while, like the Covenant, they prohibit derogation from the right to life, they make an exception in respect of deaths resulting from lawful acts of war.

168. The Covenant, as an instrument of the United Nations, does not mention war because the Charter of the United Nations has outlawed war.

169. The catalogue of the rights from which no derogation is possible, i.e. which are "emergency-proof",[95] is somewhat longer in the Covenant than in the European Convention. Thus, under the Covenant, the following are also emergency-proof: the prohibition of medical or scientific experimentation without free consent (art. 7); the prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation (art. 11); the right of everyone to recognition everywhere as a person before the law (art. 16); and the right to freedom of thought, conscience and religion, including the right to manifest one's religion or beliefs (art. 18).

170. The American Convention provides for an even longer list. Thus, it does not authorize any suspension of the following articles: article 3 (right to juridical personality); article 4 (right to life); article 5 (right to humane treatment); article 6 (freedom from slavery); article 9 (freedom from *ex post facto* laws); article 12 (freedom of conscience and religion); article 17 (rights of the family); article 18 (right to a name); article 19 (rights of the child); article 20 (right to a nationality); and article 23 (right to participate in government). Also, according to article 27, paragraph 2, of the American Convention, the provisions of paragraph 1 of the same article do not authorize any suspension of the judicial guarantees essential for the protection of those rights.

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[92] During the brief discussion it was said that "one of the areas deserving more attention by competent United Nations bodies was recognition of conscientious objection to military service and the opportunity for alternative service. In line with increasing numbers of war resisters, recognition of the right to conscientious objection had grown significantly since the Second World War. Out of about 90 countries with compulsory military service, 37 made some legislative or administrative provision for conscientious objectors. Broad public support for recognition of conscientious objection appeared to be growing." The Commission adopted resolution 38 (XXXVI) on this subject. See *Official Records of the Economic and Social Council, 1980, Supplement No. 3* (E/1980/13–E/CN.4/1408 and Corr. 1), chaps. XIII and XXVI.

[93] " 'Emergency' is an ugly word; and in economic affairs there is no predicting precisely what the psychological effects of emergency measures may be . . .". See "A State of emergency", editorial in *The Times* of 14 November 1973.

[94] For an analysis of the provisions of this article, see part two above, paras. 85–95.

[95] E. Schwelb, "Some aspects of the International Covenants on Human Rights of December 1966", in A. Eide and A. Schou, eds., *International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium, Oslo, September 25–27, 1967* (Stockholm, Almqvist and Wiksell, 1968). pp. 116. ff.

Chapter III

CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

171. From the foregoing analysis of article 4 of the International Covenant on Civil and Political Rights, the examination of relevant provisions of other international instruments on human rights, the study of the replies of Governments and certain national constitutions and the review of certain cases dealt with by international organs of implementation, the following conclusions may be drawn.

172. The only kind of emergency envisaged in article 4 is a "public emergency" and according to paragraph 1, such an emergency can occur only when "the life of the nation" is threatened and only when its existence has been "officially proclaimed" by the State party concerned. The concept "public emergency" is of recent date. It was introduced to eliminate, where possible, from legal instruments the "state of war" which has not existed in international law since the Second World War. It also replaces the traditional term "state of siege".

173. This formulation was chosen in order to provide for a qualification of the kind of public emergency in which a State would be entitled to make derogations from the rights protected by the Covenant which would not be open to abuse.

174. The present wording requires that the public emergency should be of such a magnitude as to threaten the life of a nation as a whole.

175. Article 4 rightly does not include war as a form of public emergency, because the United Nations was established with the object of preventing war.

176. "Public emergency" is a restrictive term which does not cover, for example, natural disasters, which very often justify a State party in derogating from some, at least, of the rights recognized in the Covenant.

177. The provision of article 4, paragraph 1, of the Covenant to the effect that the existence of a public emergency should be "officially proclaimed" by the State party concerned is essential in order to prevent States from derogating arbitrarily from their obligations where such action is not warranted by events.

178. In most countries a public emergency can be declared only under conditions defined by law, and that guarantee would be lost if a requirement of public proclamation were not provided for.

179. The provisions of article 4 should in no way imply that constitutional and legal limits imposed upon the powers of Governments during a public emergency can be derogated from or that the executive power is not responsible for taking measures which might conflict with national guarantees.

180. The measures which a State party may take in derogation of its obligations under the Covenant after a public emergency has been proclaimed are subject to three conditions which are specified in paragraph 1 of the article: (*a*) they must be "to the extent strictly required by the exigencies of the situation"; (*b*) they must not be "inconsistent with [the State party's] other obligations under international law"; and (*c*) they must "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

181. In particular, the measures which may be taken in derogation of the obligations of a State party under the Covenant should not be inconsistent with the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments on human rights.

182. Paragraph 2 of article 4 of the Covenant enumerates the provisions of the Covenant from which no derogations may be made.

183. No derogation may be made, even in time of public emergency, from the provisions of the following articles: article 6 (right to life); article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation); article 8 (freedom from slavery, servitude and forced labour); article 11 (right not to be imprisoned for inability to fulfil a contractual obligation); article 15 (prohibition of retroactive application of criminal law); article 16 (recognition as a person before the law); and article 18 (freedom of thought, conscience and religion).

184. When a State party avails itself of the right of derogation in time of public emergency, it is required, by paragraph 3 of article 4 of the Covenant, to comply with three steps concerning notifications of its actions. It must in each case "immediately inform" the other States parties, through the intermediary of the Secretary-General: (*a*) of the provisions of the Covenant from which it has derogated; (*b*) of the reasons by which it was actuated; and (*c*) of the date on which it terminates such derogation.

185. The proclamation of a public emergency and consequential derogation from the provisions of the Covenant is a matter of the gravest concern and the States parties have the right to be notified of such action.

186. The derogating State should also furnish the reasons by which it was actuated, although this might not include every detail of each particular measure taken. Notification should also be furnished of the date on which the derogation was terminated.

187. Certain of the international instruments on human rights contain express provisions spelling out that States may interfere with nationally and internationally guaranteed human rights in time of public emergency.

188. It is often precisely through action of this kind that the rights and freedoms of the individual are violated.

189. States of public emergency and their effects need to be scrutinized by the organs charged with the implementation of the relevant international bill of human rights.

190. The implementation provisions of the Covenant should apply to article 4 of the Covenant.

191. The onus of proof as to the existence of a public emergency and to the necessity of the measure should rest on the respondent Government.

192. Immeasurable criteria such as the margin of appreciation, the onus and standard of proof and the elements of good faith and reasonableness merely constitute useful tools at the disposal of those exercising functions of a judicial or quasi-judicial nature.

193. States of exception should not always be equated with violations of human rights.[96]

194. Even in a state of public emergency the fundamental principle of the rule of law should prevail.[97]

B. Recommendations

195. In connection with the protection of human rights in a state of public emergency, and in the light and spirit of the conclusions set forth in section A above, the Special Rapporteur proposes that the Sub-Commission on Prevention of Discrimination and Protection of Minorities should consider making the following recommendations to the Commission on Human Rights:

Elaboration of principles and guidelines governing United Nations standards relating to the protection of human rights in time of public emergency.

(1) The Commission on Human Rights should recommend to the Economic and Social Council that it authorize the Sub-Commission to elaborate a declaratory resolution containing common principles, guidelines and standards relating to the protection of human rights in time of public emergency.

(2) The Commission on Human Rights should recommend to the Economic and Social Council that it authorize the Sub-Commission to study all other aspects related to the question of the protection of human rights in time of public emergency, including such aspects as whether public emergency is an issue falling within the domestic jurisdiction of a State and the interrelationship of economic and social development and the state of emergency.

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[96] See D. O'Donnell, "States of exception", International Commission of Jurists, *The Review* (Geneva), No. 21 (December 1978), p. 53.

[97] See also the principles, safeguards, procedures and remedies referred to in part two, chaps. IV and V; and H. M. Seervai, *The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism* (Bombay, Tripathi, 1978), pp. 1-7, 60-95 and 119-129.

Annex

INTERNATIONAL, MULTILATERAL, REGIONAL AND BILATERAL INSTRUMENTS IN THE FIELD OF HUMAN RIGHTS

1. Multilateral instruments concluded under the auspices of the United Nations

Charter of the United Nations, 1945
*Universal Declaration of Human Rights, 1948
*International Covenant on Economic, Social and Cultural Rights, 1966
*International Covenant on Civil and Political Rights, 1966
*Optional Protocol to the International Covenant on Civil and Political Rights, 1966
*Proclamation of Teheran, 1968
*Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960
*International Convention on the Elimination of All Forms of Racial Discrimination, 1965
*International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 1973
*Convention on the Prevention and Punishment of the Crime of Genocide, 1948
*Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968
*Slavery Convention, 1926
*Protocol amending the Slavery Convention signed at Geneva on 25 September 1926, 1953
*Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956
*Standard Minimum Rules for the Treatment of Prisoners, 1955
*Declaration on the Protection of All Persons from Being Subjected to Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975
*Convention on the Nationality of Married Women, 1957
*Convention on the Reduction of Statelessness, 1961
*Convention relating to the Status of Stateless Persons, 1954
*Convention relating to the Status of Refugees, 1951
*Protocol relating to the Status of Refugees, 1966
*Statute of the Office of the United Nations High Commissioner for Refugees, 1950
*Declaration of the Rights of the Child, 1959
*Declaration on Social Progress and Development, 1969
*Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, 1965
Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970
Vienna Convention on the Law of Treaties, 1969

2. Other multilateral instruments

Charter of the International Military Tribunal, Nuremberg, 1945
Geneva Conventions of 12 August 1949

3. International Labour Organisation conventions

Hours of Work (Industry), 1919 (No. 1)
Night Work of Young Persons (Industry), 1919 (No. 6)
Weekly Rest (Industry), 1921, (No. 14)
*Forced Labour, 1930 (No. 29)
Hours of Work (Commerce and Offices), 1930 (No. 30)
Hours of Work and Rest Periods (Road Transport), 1939 (No. 67)
Night Work of Young Persons (Non-Industrial Occupations), 1946 (No. 79)
*Freedom of Association and Protection of the Right to Organise, 1948 (No. 87)
Night Work (Women) (Revised), 1948 (No. 89)
Night Work of Young Persons (Industry) (Revised), 1948 (No. 90)
Labour Clauses (Public Contracts), 1949 (No. 94)
*Right to Organise and Collective Bargaining, 1949 (No. 98)
*Abolition of Forced Labour, 1957 (No. 105)
Weekly Rest (Commerce and Offices), 1957 (No. 106)
Indigenous and Tribal Populations, 1957 (No. 107)
Discrimination (Employment and Occupation), 1958 (No. 111)

4. United Nations Educational, Scientific and Cultural Organization instruments

Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms, 1974.
Recommendation concerning Education for International Understanding as an Integral Part of the Curriculum and Life of the School, 1968
Recommendation on the Status of Scientific Researchers, 1974
Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, 1948
Agreement on the Importation of Educational, Scientific and Cultural Material, 1950
Convention against Discrimination in Education, 1960
Recommendation against Discrimination in Education, 1960
Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, 1964
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Ownership of Cultural Property, 1970
Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, 1972
Declaration of the Principles of International Cultural Co-operation, 1966

5. Constitutions of international organizations

International Labour Organisation (ILO)
World Health Organization (WHO)
United Nations Educational, Scientific and Cultural Organization (UNESCO)

6. Regional instruments

Charter of the Organization of American States, 1948
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 1950, and Protocols Nos. 1–5
Charter of the Organization of African Unity, 1963
American Convention on Human Rights, 1969

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*Texts of those instruments marked with an asterisk are contained in *Human Rights: A compilation of International Instruments* (United Nations publication, Sales No. E.78.XIV.2).

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